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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, ET AL., PETITIONERS,

vs.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1939.

CERTIORARI GRANTED MAY 29, 1939.

SUPREME COURT OF THE UNITED STATES

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United States Circuit Court of Appeals.

FOR THE SECOND CIRCUIT

NEIBRO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN AND EMMA BOURKE,
Appellants,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
Appellee,

and

UNITED SHIPYARDS, INC., JOSEPH W. POWELL, HUBERT E. ROGERS, JOHN E. ALDRED and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
Defendants.

Statement Pursuant to Rule 13.

I.

This suit was commenced on May 27, 1938 by the filing of the original bill, the issuance of a subpoena directed to the defendant UNITED SHIPYARDS, INC., then the sole defendant, and by the granting of an order requiring UNITED to show cause why a temporary injunction should not be granted staying it, pending final decree, from carrying out a contract for the sale of its shipyards to BETHLEHEM, and adding as additional defendants POWELL, ROGERS, ALDRED AND the CHASE BANK. The relief prayed for in the bill was a permanent injunction restraining UNITED from carrying out the

Statement Pursuant to Rule 13.

contract. By order dated June 6, 1938 a stay was denied, but POWELL, ROGERS, ALDRED and the CHASE BANK were added as additional defendants.

II.

By order dated July 26, 1938 BETHLEHEM was added as an additional defendant, and pursuant to leave contained in the order an amended and supplemental bill was filed alleging the consumation of the sale and praying relief in respect thereof, and a supplemental subpoena was issued requiring BETHLEHEM to appear and answer the amended and supplemental bill.

III.

On August 13, 1938 BETHLEHEM appeared specially by Messrs. Cravath, deGersdorff, Swaine & Wood and obtained an order directing complainants to show cause why service of the subpoena and the Marshal's return of service of the subpoena on BETHLEHEM should not be set aside on the ground that the venue of the suit, as against BETHLEHEM, was improperly laid in the Southern District of New York, the jurisdiction of the Court being based on diversity of citizenship, and BETHLEHEM claiming that it appeared from the face of the bill that complainants are citizens and residents of the State of New Jersey and inhabitants of the District of New Jersey, and BETHLEHEM is a citizen and resident of the State of Delaware, and an inhabitant of the District of Delaware.

The motion was argued before Judge Caffey on September 2, 1938, and the order appealed from, granting the motion, was made by him on September 26, 1938. This appeal was taken on December 17, 1938.

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,

Complainants,

against

UNITED SHIPYARDS, INC., JOSEPH W. POWELL, HUBERT E. ROGERS, JOHN E. ALDRED, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK and BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Defendants.

Notice is hereby given that NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE, the complainants above named, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the order dated and filed September 26, 1938 setting aside, vacating and quashing the attempted service of the supplementary subpoena herein, dated July 27, 1938 upon BETHLEHEM SHIPBUILDING CORPORATION, LTD. and dismissing the amended and supplemental bill of complaint as against BETHLEHEM SHIPBUILDING CORPORATION, LTD.

Dated, New York, December 17, 1938.

ROBERT P. WEIL,
Solicitor for Complainants,
50 Broadway,
New York, N. Y.

To:

CRAVATH, deGERSDORFF, SWAINE & WOOD,
Solicitors for defendant
BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
appearing specially.

CHARLES WEISER, Clerk,
UNITED STATES DISTRICT COURT,
Southern District of New York.

Order Appealed From.

(Same Title)

This cause having come on further to be heard upon the motion of Bethlehem Shipbuilding Corporation, Ltd., appearing specially solely for the purpose of said motion, for an order setting aside, vacating and quashing the marshal's return of service and the attempted service upon it of the supplemental equity subpoena dated July 27, 1938, and said motion having been argued by counsel, and upon due consideration thereof, it is

ORDERED that the said motion be and is hereby in all respects granted, and the attempted service of the supplemental equity subpoena herein, dated July 27, 1938, and the marshal's return of said service dated July 28, 1938, upon Bethlehem Shipbuilding Corporation, Ltd., be and are hereby set aside, vacated and quashed, and the amended and supplemental bill of complaint herein, verified July 15, 1938, is accordingly dismissed as to said Bethlehem Shipbuilding Corporation, Ltd.

Dated New York, September 26th, 1938.

FRANCIS G. CAFFEY,
U. S. D. J.

Opinion of Judge Caffey on Making the Order Appealed From.

The sole problem is the interpretation of Section 51 of the Judicial Code (28 U. S. C. A. Sec. 112). It is settled by Camp v. Gress, 250 U. S. 308 that the section confers on Bethlehem the right to object to the venue which the complainants assert in this suit. In a decision with which I agree this court has squarely held that this right has not been waived by Bethlehem doing business in New York, obtaining a certificate to do business and designating an agent for service of process on it, in conformity with a state statute (*Beachnut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271).

Motion granted and bill as against Bethlehem dismissed. Settle order or two days' notice.

September 15, 1938.

F. G. C.

Order Permitting Filing of Amended and Supplemental Bill, Adding Bethlehem as a Party Defendant, and Authorizing the Issuance of a Supplemental Subpoena Requiring Bethlehem to Answer Amended and Supplemental Bill.

(Same Title)

The complainants having moved this Court for an order:

1. approving the filing of their amended and supplemental bill of complaint as a supplemental bill of complaint and directing that the defendants United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, John E. Aldred and The Chase National Bank of the City of New York be required to answer said supplemental bill of complaint;

2. adding BETHLEHEM SHIPBUILDING CORPORATION, LTD. as a party defendant and directing the issuance of a supplemental subpoena to said Bethlehem Shipbuilding Corporation, Ltd. requiring Bethlehem Shipbuilding Corporation, Ltd. to appear and answer said supplemental bill of complaint; and

3. amending the caption of this suit;

and said motion having regularly come on to be heard before the Court at a Stated Term thereof, held in and for the Southern District of New York, at the United States Courthouse on July 26, 1938 and after hearing ROBERT P. WEIL, solicitor for the complainants in support of said motion, and the defendant United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, and John E. Aldred having appeared by Rogers and Whitaker, their solicitors, by David Katz, Esq., of counsel, and the defendant The Chase National Bank of the City of New York having appeared by Mudge, Stern, Williams & Tucker, their solicitors, by Milton Black, Esq.,

of counsel, and none of said defendants having interposed any opposition to the granting of said motion,

Now, on motion of Robert P. Weil, solicitor for the complainants, it is upon said amended and supplemental bill of complaint, and upon the order of Honorable Henry W. Goddard, dated July 18, 1938, requiring the defendants to appear on July 19, 1938 and show cause why complainants should not have the aforesaid relief, and upon the affidavit of Robert P. Weil, sworn to July 18, 1938 in support of said motion, and upon due proof of the service of said order to show cause upon the defendants and of the complainants' notice that said motion would be brought on for hearing July 26, 1938 and upon all the other pleadings and proceedings herein,

ORDERED that the filing of the amended and supplemental bill of complaint herein be and the same hereby is approved as the filing of a supplemental bill of complaint, the defendants UNITED SHIPYARDS, INC., JOSEPH W. POWELL, HUBERT E. ROGERS, JOHN E. ALDRED and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK are required to answer said amended and supplemental bill of complaint or move with respect thereto within 20 days after service of a copy of this order with notice of filing; and it is

FURTHER ORDERED that Bethlehem Shipbuilding Corporation, Ltd. is hereby joined herein as an additional party defendant and a supplemental subpoena shall issue requiring said Bethlehem Shipbiulding Corporation, Ltd. to appear and answer or move with respect to said amended and supplemental bill of complaint within 20 days after service of said subpoena and of a copy of this order with notice of filing; and it is

Order Permitting Filing of Amended and Supplemental Bill, etc.

FURTHER ORDERED that the caption of this action be as follows:

"United States District Court
Southern District of New York

Neirbo Company, The A. P. Smith Manufacturing Company, Denis F. O'Brien and Emma Bourke,

Complainants,

against

United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, John E. Aldred, The Chase National Bank of the City of New York and Bethlehem Shipbuilding Corporation, Ltd.,

Defendants.

In Equity No. E-87/117"

Dated, New York, July 26th, 1938.

HENRY W. GODDARD,
United States District Judge.

The foregoing order is hereby consented to as to form.

ROGERS & WHITAKER

ROGERS & WHITAKER, Solicitors for Defendants United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers and John E. Aldred.

MUDGE, STERN, WILLIAMS & TUCKER

MUDGE, STERN, WILLIAMS & TUCKER, Solicitors for Defendant The Chase National Bank of the City of New York.

Amended and Supplemental Bill.

(Same Title)

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

COME NOW the complainants above named, by ROBERT P. WEIL, their solicitor, and allege for their amended and supplemental bill of complaint:

1. Complainant NEIRBO COMPANY (sometimes hereinafter referred to as NEIRBO) is, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of New Jersey and is a citizen and resident of the State of New Jersey.

2. Complainant THE A. P. SMITH MANUFACTURING COMPANY is, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of New Jersey and is a citizen and resident of the State of New Jersey.

3. Complainant DENIS F. O'BRIEN (sometimes hereinafter referred to as O'BRIEN) is, and at all times herein mentioned has been, a citizen and resident of the State of New Jersey.

4. Complainant EMMA BOURKE is, and at all times herein mentioned has been, a citizen and resident of the State of New Jersey.

5. Defendant UNITED SHIPYARDS, INC. (sometimes hereinafter referred to as UNITED) was organized under the Stock Corporation Law of the State of New York pursuant to certificate filed with the Department of State of the State of New York on December 13, 1928, with the name "UNITED DRY DOCKS, INCORPORATED". By certificate filed with the

Department of State of the State of New York on May 5, 1936, the name of UNITED was changed to "UNITED SHIPYARDS, INC.", its present designation. UNITED is, and at all times since its aforesaid incorporation has been, a citizen and resident of the State of New York. The executive office and principal place of business of UNITED is at #11 Broadway, New York City, in the Southern District of New York.

6. Defendant THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK (sometimes hereinafter referred to as the CHASE BANK) is a national banking association chartered to do business in the State of New York and is a citizen and resident of the State of New York. The principal office of the Chase Bank is at #10 Pine Street, New York City, in the Southern District of New York.

7. Defendant BETHLEHEM SHIPBUILDING CORPORATION, LTD. (sometimes hereinafter referred to as BETHLEHEM) is, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of Delaware and is a citizen and resident of the State of Delaware. Bethlehem has a permanent office, at which it regularly transacts its business, at #25 Broadway, New York City, in the Southern District of New York and is permanently present in the Southern District of New York for the conduct of its business.

8. Defendant JOSEPH W. POWELL (sometimes hereinafter referred to as POWELL) is a citizen of the State of Massachusetts, but is engaged in business as President of UNITED, and as such is permanently present in the Southern District of New York.

9. Defendant HUBERT E. ROGERS (sometimes hereinafter referred to as ROGERS) is a citizen and resident of the State of New York and of the Southern District of New York.

10. Defendant JOHN E. ALDRED (sometimes hereinafter referred to as ALDRED) is a citizen and resident of the State of New York. Aldred is engaged in business at #40 Wall Street in the City of New York and is permanently present in the Southern District of New York. 31

11. Powell, Rogers, Aldred and the Chase Bank own, hold, or control upwards of two-thirds of the total outstanding Class A shares of United, and have owned, held or controlled said Class A shares since the original issuance thereof in May, 1936, as hereinafter more particularly set forth.

12. The complainants are respectively the owners and holders of the shares of the Class B stock of UNITED represented by the following certificates: 32

Certificate No.	Issued in Name of	No. Shares
NEIRBO COMPANY		
BNC 857	Neirbo Company	100
BNC 858	Neirbo Company	100
BNC 859	Neirbo Company	100
BNC 860	Neirbo Company	100
BNC 861	Neirbo Company	100
BNC 862	Neirbo Company	100
BNC 863	Neirbo Company	100
BNL 438	Neirbo Company	87
B 42	Neirbo Company	½ 33
BNC 852	Denis F. O'Brien	100
BNC 853	Denis F. O'Brien	100
BNC 854	Denis F. O'Brien	100
BNC 855	Denis F. O'Brien	100
BNC 856	Denis F. O'Brien	100
BN 7	Neirbo Company	200
BN 8	Neirbo Company	500
		1987½

Certificate No.	Issued in Name of	No. Shares
THE A. P. SMITH MANUFACTURING COMPANY		
BNC 864	Peter A. Smith	100
BNC 865	Peter A. Smith	100
BNC 866	Peter A. Smith	100
BNC 867	Peter A. Smith	100
BNC 868	Peter A. Smith	100
BNC 869	Peter A. Smith	100
BNC 870	Peter A. Smith	100
BNC 871	Peter A. Smith	100
BNC 872	Peter A. Smith	100
		900
DENIS F. O'BRIEN		
BNL 437	Denis F. O'Brien	50
EMMA BOURKE (MISS)		
BNL 694	Miss Emma Bourke	35

13. The value of the above listed shares owned and held by complainant Neirbo exceeds $3,000 and the effect of the sale of the plants of UNITED to Bethlehem, hereinafter more particularly referred to, has, or will, result in a decrease in the value of said shares, which decrease, upon information and belief has exceeded or will exceed $3,000 exclusive of interest. The matter in controversy herein exceeds the sum or value of $3,000 exclusive of interest and costs.

14. JOSEPH W. POWELL, (sometimes hereinafter referred to as POWELL) is a graduate of the United States Naval Academy, is an engineer by profession, and is an expert in the design and construction of ships, and in the operation of shipyards, prior to his connection with UNITED having been successively president of Fore River Shipbuilding Company, a subsidiary of Bethlehem Steel Corporation, vice president of Bethlehem, and chairman of the United States Shipping Board Emergency Fleet Corporation. As hereinafter more specifically set forth, Powell was one of the organizers

of UNITED, was chairman of the Board for about a year after it commenced business, and thereafter became president, which office he has held at all times up to the present. At all times Powell has been a director of UNITED.

15. Rogers is a lawyer. He was active with Powell in the organization of UNITED, and at all times has been secretary and a director of UNITED. Rogers & Whitaker, Rogers' firm, has at all times been general counsel to UNITED.

16. Upon information and belief, in or about the Fall of 1928, the Chase Bank held a mortgage on the properties of W. & A. Fletcher Company in the sum of $2,000,000 which mortgage was in default. W. & A. Fletcher Company was in receivership in the Chancery Court of New Jersey, and in the receivership suit, an order had been made restraining the Chase Bank from foreclosing said mortgage. Aldred or Aldred & Company owned a one half interest in New York Harbor Dry Dock Company. The interest of the defendants other than UNITED in companies operating shipyards in New York Harbor is unknown to complainants. At that time, Powell, Rogers, Aldred, the Chase Bank and The Chase Securities Corporation, its then subsidiary, entered into a scheme to launch a public company to acquire and combine the business and properties of W. & A. Fletcher Company, New York Harbor Dry Dock Company, and other corporations operating shipyards in New York Harbor.

17. In pursuance of this scheme, UNITED was incorporated as aforesaid, with an authorized capital consisting of 200 shares without par value. On January 7, 1929 none of said shares were issued or outstanding. On January 7, 1929, pursuant to section 36 of the Stock Corporation Law of the State of New York, a certificate was filed in the office of the Secretary of State of the State of New York increasing the

number of shares which UNITED was authorized to issue to 870,000 shares, divided into 20,000 shares of 6% Preferred stock, of the par value of $100. each and 850,000 shares of Common stock without par value. Said Preferred stock was entitled to a dividend of 6% per annum, when and as declared by the Board of Directors, in preference to any dividend on the Common stock. Said dividend was non-cumulative until January 1, 1932, and cumulative thereafter. Upon dissolution, or upon any other distribution of assets, other than as a dividend from surplus or net profits, the Preferred stock was entitled to payment of $100. per share plus non-
41 cumulative dividends declared and unpaid, and plus cumulative dividends accrued and unpaid, in preference to any distribution to the holders of the Common Stock. Said Preferred stock was non-participating both as to dividends from net earnings or surplus and upon any other distribution of assets; that is to say, after payment of Preferred dividends, the holders of the Common stock were entitled to receive the entire amount set apart from time to time from net earnings or surplus for dividend purposes, and upon dissolution or upon any other distribution of assets other than as a dividend from net earnings or surplus, the holders of the Common stock were entitled to receive the entire net assets of the corporation then available for distribution to stockholders
42 after payment to the holders of the Preferred stock of $100. per share plus unpaid Preferred dividends as aforesaid. On all matters and without restriction the stockholders were entitled to one vote in respect of each share of stock. Up to December 31, 1933, each share of Preferred stock was, at the option of the holder thereof, exchangeable into 2½ shares of Common stock. The Preferred stock was callable after January 1, 1934 at $100. a share plus accrued unpaid dividends.

18. Pursuant to the scheme aforesaid, in or about the early part of 1929 UNITED entered into agreements to acquire

the business and properties of the following corporations operating shipyards in New York Harbor:

Staten Island Shipbuilding Company
Morse Dry Dock and Repair Company
James Shewan and Sons Company
Theodore A. Crane's Sons Company
W. & A. Fletcher Company
New York Harbor Dry Cork Company

19. The consideration which UNITED agreed to pay for the assets of each of said companies is unknown to complainants. 44
The aggregate however, was, upon information and belief

for plants, machinery and equipment....	$18,840,000
for materials and supplies	1,250,000
	$20,090,000

20. In or about the early part of 1929 some 553,750 shares of No Par Value Common Stock of United were underwritten and marketed for $11,075,000, and Preferred stock of United of the par value of $1,815,000 was issued for property.

21. Upon information and belief, the underwriters included The Chase Securities Corporation, Hayden, Stone & Company, Pynchon & Company and Minch, Monell & Company. 45

22. In the Fall of 1928 O'Brien was the owner of a substantial interest in BAKER SCOTT CORPORATION, a close corporation.

23. In or about the Fall of 1928, Powell stated to O'Brien and other persons interested in Baker Scott Corporation

(a) that Powell was endeavoring to arrange for the consolidation under one management, and the acquisi-

tion by a corporation to be formed for the purpose, of the properties and business of the corporations hereinabove named in Paragraph 18 hereof;

(b) That said properties had been appraised by Coverdale & Colpitts at approximately $26,000,000;

(c) that the new company was acquiring said properties at a reasonable figure, substantially less than $26,000,000;

(d) that the new company would have upwards of 50% of the drydock facilities of New York Harbor and a large portion of the New York Harbor facilities for repairing vessels;

(e) that the rates in New York Harbor for dry-docking and repairing vessels were substantially below the rates therefor in other ports on the Atlantic Seaboard;

(f) that he and his associates in the enterprise confidently believed that this discrepancy would be adjusted;

(g) that he believed that the new company would have a stable and profitable business and would be able to show at least a satisfactory return upon the capital invested therein, and that the new company was being launched for the sole purpose of legitimately prosecuting such business.

24. Relying upon said statements of Powell, O'Brien and others interested in said Baker Scott Corporation caused said corporation to subscribe for 30,000 shares of the Common stock of UNITED at $20.00 per share, or a total of $600,000.

25. Shortly after January 7, 1929 Baker Scott Corporation paid in cash for the shares for which it subscribed as aforesaid and received said shares from UNITED.

26. The complainants acquired their Class B stock in the manner following:

In 1931 Baker Scott Corporation divided the shares of UNITED purchased as aforesaid, among its shareholders pro rata. A portion of the shares so distributed to O'Brien were held by him and a portion thereof were assigned by him to his personal holding company, Neirbo. In addition, shortly after the above alleged purchase by Baker Scott Corporation and long before the commencement of the reorganization proceedings hereinafter referred to, O'Brien purchased additional Common shares of UNITED for the complainant The A. P. Smith Manufacturing Company, of which he is president, 50 and for his sister-in-law Miss Emma Bourke.

In or about May, 1936, pursuant to the Amended Plan of Reorganization of UNITED, hereinafter more particularly referred to, each two shares of Common stock were converted into one share of Class B stock, the certificates listed in Paragraph 12 hereof being thereupon and pursuant to said Plan issued to the complainants.

27. As of February 28, 1929, UNITED acquired the properties and business of the corporations referred to in Paragraph 18.

28. As of March 1, 1929, UNITED commenced business with the following balance sheet: 51

ASSETS:		
Plants, machinery and equipment at cost		$18,840,000
Current Assets:		
Cash	$2,200,000	
Materials and supplies	1,250,000	
		3,450,000
Organization expenses, etc.		250,000
		$22,540,000

LIABILITIES:

6% Preferred stock, $100 par value, Outstanding 18,150 shares		$ 1,815,000
Common stock, no par value, Outstanding 553,750 shares		11,075,000
Mortgages:		
Alderton Plant mortgage is assumed	$1,150,000	
Purchase money mortgages given by United on other plant	8,500,000	
		9,650,000
		$22,540,000

29. In part payment of the purchase price, UNITED as of February 28, 1929, gave back 10 year purchase money mortgages at 5% interest in the following respective amounts on the plants acquired:

Staten Island Shipbuilding Company	$2,500,000
Morse Dry Dock & Repair Company	2,900,000
W. & A. Fletcher Company	500,000
James Shewan & Sons Company	1,300,000
Theodore A. Crane's Sons Company	800,000
New York Harbor Dry Dock Company	500,000

30. As of February 28, 1929, James A. Shewan & Sons Company assigned the mortgage given by UNITED to it to Powell and Rogers, and Powell and Rogers further assigned said mortgage to the Chase Bank.

31. As of February 28, 1929, Theodore A. Crane's Sons Company assigned a senior $400,000 interest in the mortgage given by UNITED to it to Powell and Rogers, and Powell and Rogers further assigned said interest to the Chase Bank.

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32. New York Harbor Dry Dock Company assigned a one half interest in the mortgage given by UNITED to it to Aldred & Company, the firm of Aldred, and the remaining one half interest in said mortgage to Swan, Hunter and Wigham, Richardson, Ltd. Thereafter Aldred & Company assigned said interest to the Chase Bank.

33. Subsequent to February 28, 1929, UNITED acquired title to the land upon which the plant acquired from the New York Harbor Dry Dock Company was located, and in part payment therefor gave a purchase money mortgage in the sum of $165,000.

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34. Shortly after commencing operations, UNITED closed said plant and sold the real estate to O'Brien Brothers Shipyards Corporation. Said sale did not include tools, stores, and two drydocks, one of which drydocks was sold to Todd Shipyards Corporation.

35. As of February 28, 1929 John W. Enright and Andrew Fletcher, Jr. as Receivers of W. & A. Fletcher Company assigned the mortgage given by UNITED to them as Receivers to the Chase Bank.

36. UNITED took title to one of the plants of the Morse Dry Dock & Repair Company known as the Alderton Yard, located at #518 Hamilton Avenue, Borough of Brooklyn, New York City, subject to two mortgages in addition to the aforementioned purchase money mortgage for $2,900,000. The first mortgage, originally in the sum of $600,000. was held by the New York Title & Mortgage Company. Said first mortgage had been reduced by payments on account of principal so that on February 28, 1929 there was due thereon approximately the sum of $414,370. The second mortgage was in the sum of $300,000 and was held by Flor-

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ence M. Rogers. The third mortgage, originally in the sum of $425,000 was held by Alderton Dockyards, Ltd. The said third mortgage had been reduced by payments on account of principal so that on February 28, 1929 there was due thereon approximately $415,000. UNITED paid the purchase price for the properties acquired by it from said Morse Dry Dock & Repair Company in part by assuming and agreeing to pay said three last mentioned mortgages.

37. On or about September 15, 1931, said second mortgage held by Florence M. Rogers was paid off by UNITED and satisfied of record and the lien thereof on said Alderton Yard extinguished, and thereby the said mortgage held by Alderton Dockyards, Ltd., became a second mortgage on the Alderton Yard, subject and subordinate only to the aforementioned first mortgage held by the New York Title and Mortgage Company.

38. MOSS ESTATE, INCORPORATED is, and at all times herein mentioned, since January 1, 1933 has been, a personal holding corporation controlled by Rogers.

39. In 1933 Moss Estate, Incorporated, acquired a $315,000 senior interest in said second mortgage on the Alderton Yard.

40. Upon information and belief the consideration for the acquisition of said mortgage by Moss Estate, Incorporated, was the sum of $80,000 paid by Rogers.

41. Shortly after commencing operations, UNITED closed and dismantled said plant.

42. In July, 1930, UNITED acquired the business and substantially all of the property, real and personal, of BRIGGS ENGINEERING COMPANY.

43. UNITED paid part of the consideration therefor by giving back a five year purchase money mortgage in the sum of $70,000 at 5% interest. 61

44. In 1933, UNITED closed said plant and sold a portion of the real estate.

45. On July 23, 1934, UNITED filed in this Court a petition praying that it be reorganized under section 77B of the Bankruptcy Act. On the same day this Court entered an order approving said petition and authorizing the defendant to continue the operation of its business. Rogers and Whitaker, the law firm of Rogers, were attorneys for UNITED as debtor in said proceedings. 62

46. On or about December 23, 1935, UNITED as debtor in said proceedings proposed its Amended Plan of Reorganization, sometimes hereinafter referred to as "the Plan".

47. Certain of the principal features of the Plan were as follows:

(a) The purchase money mortgages given by UNITED to Staten Island Shipbuilding Company and to Morse Dry Dock & Repair Company were extended and modified so as to make the interest rate dependent upon the earnings of the defendant except for minimum annual payments, and so as to relieve the defendant of any obligation for a deficiency judgment in case either of said mortgages should be foreclosed. 63

(b) The leases on the Shewan Plant and the Fletcher Plant were extended and modified so that the rental would be dependent on the earnings of the company, except for minimum annual payments.

(c) The premises upon which the Alderton Plant was located were abandoned, leave being given to the holder of the first mortgage thereon to foreclose said mortgage.

(d) The lease of the premises upon which the Crane Plant was located was cancelled by agreement.

(e) The unsold portion of the Briggs property was surrendered to the holder of the mortgage thereon.

(f) The authorized capital of UNITED was changed so as to consist of 1,000,000 shares of Class A and 345,000 shares of Class B stock. The Class A stock was distributed on the allowed claims of creditors and the Class B stock on the allowed claims of stockholders.

(g) Certain other claims, and the disposition thereof pursuant to the Plan were as follows:

1. The claims of the mortgagees and landlords for unpaid interest and rent were satisfied by the issuance of one Class A share for each $20 of claim allowed.

2. The Chase Bank filed a claim for $1,251,400 principal and $199,311.12 interest, secured by the mortgage on the Shewan Plant as pledgee of said mortgage as security for a personal loan owing by Powell and Rogers. The claim was allowed and the Plan provided for satisfaction thereof by the issuance to the Chase Bank of Class A stock at the rate of one share for each $10 of principal and one share for each $20 of interest or a total of 134,122 shares.

3. The Chase Bank filed a claim as the holder of the senior $400,000 interest in the mortgage on the

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Crane plant, as pledgee of said interest as security for a personal loan to Powell and Rogers, and the Crane Company filed a claim as the holder of the junior $400,000 interest therein. $800,000 principal and $126,277 interest was the indebtedness of UNITED on said mortgage. The Plan provided for satisfaction of said claims by the issuance of Class A stock at the rate of one share for each $10 of principal and one share for each $20 of interest, two-thirds of said shares to the Chase Bank, or 54,540 shares, and one-third to the Crane Company, or 28,770 shares.

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4. The Chase Bank filed a claim for $249,725 principal and $39,403.04 interest secured by a half interest in the mortgage on the New York Harbor Dry Dock Company plant as pledgee of said interest as security for a personal loan owing by Aldred & Company. Swan, Hunter and Wigham, Richardson, Ltd. filed a claim in like amount as the owner of the other half interest in said mortgage. Said claims were allowed and the Plan provided for satisfaction thereof by the issuance of Class A stock at the rate of one share for each $10 of principal and one share for each $20 of interest, or a total of 26,749 shares to the Chase Bank and 26,749 shares to Swan, Hunter and Wigham, Richardson, Ltd.

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5. The Chase Bank filed a claim for $499,200 principal and $78,766.64 interest, secured by a mortgage on the Fletcher plant, as the owner of said mortgage: The claim was allowed and the Plan provided for satisfaction thereof by the issuance of Class A stock to the Chase Bank at the rate of one share for each $10 of principal and one share for each $20 of interest, or a total of 53,472 shares.

6. Moss Estate, Incorporated filed a claim as the owner of a senior interest in the second mortgage on the Alderton Yard. Said claim was allowed for $415,000 principal and $10,841.17 interest, and the Plan provided for the satisfaction thereof by the issuance of Class A stock to Moss Estate, Incorporated at the rate of one share for each $20 of principal and interest, or 21,892 shares.

The allowance of said claim was subject to reduction by the amount of any sum received by Moss Estate, Incorporated out of the proceeds of the sale of the property in proceedings for the foreclosure of the first mortgage, provided, however, that the claim of Moss Estate, Incorporated might be fixed at the sum of $425,841.17 and Class A stock totalling 21,292 shares might be issued in respect thereof upon assignment by Moss Estate, Incorporated to UNITED of its right to receive a share of the proceeds of the aforesaid foreclosure sale. Upon information and belief, such an assignment was made by Moss Estate, Incorporated to UNITED.

Upon information and belief Rogers never disclosed to the Court or to the general body of the creditors and stockholders of UNITED that Moss Estate, Incorporated had acquired its interest in said mortgage on the Alderton Yard for $80,000 or for any amount less than the face value of said interest, and at all times during the pendency of said proceedings, said fact was unknown to the Court and to the general body of the creditors and stockholders of UNITED.

7. Claims for accounts payable were allowed in the sum of approximately $225,000. The Plan provided that there be issued in satisfaction thereof Class A stock at the rate of one share for each $20 of such claims allowed.

Out of a total of 411,710 shares of Class A stock issued and outstanding pursuant to the Plan, the Plan thus provided that 290,775 shares be issued to or for the account of the Chase Bank, Powell, Rogers, Rogers' company, Moss Estate, Incorporated, and Aldred's firm, Aldred & Company, of which 215,411 shares were to be issued to the Chase Bank in satisfaction of claims based on mortgages on the companys' property, pledged for personal loans to Powell, Rogers and Aldred & Company.

(h) The claims of stockholders were disposed of pursuant to the Plan as follows: 74

1. Each share of the Preferred stock was converted into four shares of Class B stock.

2. Each two shares of Common stock were converted into one share of Class B stock.

48. The Plan provided as follows with respect to the voting rights of the proposed new Class A and Class B stock:

(Sub-division III).

"Each share of Class A stock shall entitle the holder to one vote on all matters, including but not limited to, 75
the election of directors, except the election of the director to be elected by the holders of the Class B stock as hereinafter provided, * * *. The holders of Class B stock shall not be entitled to vote upon any matters except as required by law and except that, voting as a class, they shall be entitled to elect one member of the Board of Directors of the Reorganized Company, and in voting for such one member of the Board of Directors, each holder of such Class B stock shall be entitled to one

vote for each share thereof. * * * Subject to the foregoing provisions and to any orders of the Court in the premises, the forms and terms of the Certificate of Incorporation, by-laws and certificates for capital stock of the reorganized company shall be such as the Board of Directors and/or stockholders of the Company or Reorganized Company may determine."

49. Section 51 of the Stock Corporation Law of the State of New York provides, and at all times herein mentioned has provided, that any class of stock may be excluded from the right to vote on all or any specified questions upon which the stockholders of a New York corporation would otherwise be entitled to vote, but that, except as specifically and in so many words excluded therefrom, all stockholders shall be entitled to vote on a proposal to sell substantially all of the assets of the corporation, and upon certain other matters enumerated in said section 51.

50. At a hearing on notice to all interested parties, including the Preferred and Common stockholders of UNITED, held in this Court on March 27, 1936, the Plan was declared confirmed, and on April 1, 1936, a decree of confirmation was filed.

51. Nevertheless, Powell, Rogers, Aldred and the Chase Bank deprived the holder of the Class B stock of the Reorganized Company, into which stock the Preferred and Common shares were to be converted, of the right to vote on a proposal to sell the assets of the corporation in the manner following:

(a) They sent out to all stockholders, and solicited all stockholders to execute, a form of instrument, which, when executed, would be effective as

(i) a consent to the Plan;

(ii) a proxy to Powell, Rogers and one George H. Bates, or any of them, to vote the stock of the signer, upon confirmation of the Plan, in favor of amendments to the Certificate of Incorporation necessary or advisable to put the Plan into effect;

(iii) a waiver by the signer of notice of a meeting of stockholders to consider such amendments to the Certificate of Incorporation.

(b) They called a special meeting of stockholders for 80
April 11, 1936

"* * * to consider and vote upon the following proposals in connection with putting into effect and carrying out the provisions of the Plan of Reorganization as amended, dated December 23, 1935, which Plan of Reorganization was confirmed by a Decree of the United States District Court for the Southern District of New York, dated April 1, 1936: (1) to reduce the authorized number of shares of 6% Preferred Stock of the par value of $100 per share from 20,000 to 16,275; (2) to change the 16,275 shares of said 6% Preferred Stock, authorized and issued after such re- 81
duction, into 16,275 shares of 6% Preferred Stock without par value; (3) to change the 16,275 shares of said 6% Preferred Stock without par value, authorized and issued, after the changes proposed in (1) and (2) have been affected, into 65,100 shares of Class B stock of the par value of $1 per share; (4) to reduce the authorized number of shares of Common Stock without par value from 850,000 to 809,800; (5) to change 558,437 authorized and issued shares of Common

Stock without par value and 1,363 authorized but unissued shares of said Common Stock without par value to 279,900 shares of Class B stock of the par value of $1 per share; (6) to change the remaining 250,000 authorized but unissued shares of said Common Stock without par value into 1,000,000 shares of Class A Stock of the par value of $1 per share; (7) in connection with the changes proposed in (3), (5) and (6), to provide for the issue of scrip certificates representing fractional rights to receive full shares upon combining such scrip certificates with other like scrip certificates representing in the aggregate the right to receive one or more full shares; and (8) to change the name of the Corporation from United Dry Docks, Incorporated to United Shipyards, Inc.; and for the transaction of such other business in connection with the foregoing proposals or in connection with any further action necessary to carry out and put into effect the provisions of said Plan of Reorganization as amended, or otherwise as may properly come before said meeting or any adjournment or adjournments thereof."

(c) At an adjourned session of said meeting, on April 13, 1936, they caused Powell and Rogers, Bates not acting, to vote as proxies for the holders of upwards of two-thirds of the outstanding Preferred and Common stock in favor of amendments to the Certificate of Incorporation creating Class A stock holding the sole right to vote on a proposal to sell the assets of the corporation, said amendments containing language specifically excluding the Class B stock from the right to vote on such a proposal.

(d) At a hearing on April 24, 1936, held on successive adjournments of the hearing of March 27, 1936,

they presented the amendments to the Court for approval, with only the following statement:

> Mr. Rogers * * * "Second, we are asking your Honor to formally approve the amendments to the Certificate of Incorporation which carry out the terms of the Plan, and we are also asking your Honor to adjourn this hearing to the 8th day of May so that we may then report having closed and get such an order as is incident to the situation at that time. * * * With respect to the amendments to the Certificate, I have here the pages from the minute book. Now if your Honor will permit, I would like to substitute in place of these original minutes, copies certified by the Secretary some time during the day."

Said amendments comprised three certificates totalling 41 pages. Later on April 24th, 1936, they procured the Court to sign an order reciting that said amendments were held and determined to be in accordance with the provisions of the Plan, and approving said amendments.

(e) Upon information and belief at no point and in no way did they disclose to the Court that the amendments vested the sole right to vote on a sale of the assets in the Class A stock and specifically excluded the Class B stock from said right. At no hearing were the voting rights of the Class A and Class B shares discussed.

(f) At no point and in no way did they give any notice to the Preferred and Common stockholders.

> (i) that the amendments to be adopted at the special meeting of stockholders and by vote of the proxies would vest the sole right to vote on a sale of the assets

in the Class A stock, except that the provisions of said amendments regarding voting were printed on the backs of the certificates for the Class A and Class B shares, which were distributed after May 5, 1936; or

(ii) that at the hearing of April 24th, the amendments would be submitted to the Court for approval and for an adjudication that they conformed to the Plan.

(g) Upon information and belief the provisions defining the voting rights of the then proposed Class A and Class B stock were completely drafted previous to the hearing on confirmation of the Plan.

52. On May 5, 1936, said amendments, with certificates indicating the adoption thereof at said special meeting were filed in the office of the Secretary of State of the State of New York.

53. The Certificate of Incorporation of UNITED as affected by said amendments provides, and at all times since May 5, 1936 has provided in part as follows with respect to the designations, preferences, privileges and voting powers of the stock of UNITED as reorganized:

(a) DIVIDENDS

The holders of the Class A stock shall be preferentially entitled to receive, out of surplus available for dividends, if, as and when declared by the Board of Directors, dividends at the rate of $1.25 per share per annum. Such dividends shall be non-cumulative, but unless and until paid or declared and set apart in any year, no dividends shall be declared in such year on the Class B stock. After the Preferred dividend on the Class A stock shall

have been declared and set apart in any year, any additional sum set apart for dividend purposes shall be applied two-thirds as an additional dividend on the Class A stock and one-third as dividend on the Class B stock.

(b) PREFERENCE AND OR PARTICIPATION OF CLASS A AND CLASS B STOCK UPON DISTRIBUTION OF ASSETS

In the event of any liquidation, dissolution or winding up of the corporation or any reduction of its capital or capital stock, resulting in the distribution of any assets to stockholders, the holders of the Class A stock shall 92
be preferentially entitled to receive $12.50 per share, plus any dividends declared but unpaid on the Class A stock, before any amount shall be paid or any property or assets distributed on the Class B stock, and thereafter the remaining assets of the corporation available for distribution to stockholders shall be divided among the holders of the Class A stock and the Class B stock pro-rata in accordance with their respective shareholdings, as if the shares of Class A and the shares of Class B were all shares of one class.

(c) REDEMPTION OF CLASS B STOCK

The Class B stock is redeemable at any time at the 93
option of the corporation at $10 per share plus declared but unpaid dividends, Class B shares redeemed to be cancelled and retired and not reissued.

(d) CONVERSION OF CLASS B STOCK INTO CLASS A STOCK

The Class B stock is convertible into Class A stock at any time, share for share, on payment to the corporation of $10 per share. Class B shares so converted shall be cancelled and retired and not reissued.

(e) VOTING RIGHTS OF CLASS A AND CLASS B STOCK

The Class B stockholders shall have the right to elect one director. Except therefor, the holders of the Class A stock shall have the absolute and exclusive voting power. The holders of the Class B stock are specifically excluded from the right to vote on a sale of all or substantially all of the assets of the corporation and on the other matters referred to in section 51 of the New York Stock Corporation Law.

(f) WAIVER OF PREEMPTIVE RIGHTS

No stockholder shall have any preemptive right to subscribe for any authorized but unissued stock or for any new or additional stock or bonds authorized in the future.

54. On May 2, 1938, UNITED, acting through Powell as president and Rogers as secretary, entered into a contract with Bethlehem, hereinafter referred to as "the Bethlehem Contract". The Bethlehem Contract provided for the sale to Bethlehem, for a consideration of $9,300,000. of the plants of UNITED, its inventory of raw materials, its business, good will, plans, drawings, patterns, templates, licenses, tradenames, trademarks, copyrights, all estimating and cost data and records, and the right to use UNITED's corporate name. Said contract provided and provides further that for a period of ten years UNITED will not engage in the business of building, repairing and/or drydocking vessels within 400 miles of New York Harbor.

55. Upon information and belief for the ten years preceding May 2, 1938, there had been practically no new construction of merchant vessels here or abroad except tankers and a few luxury liners. A world wide demand for merchant

and naval vessels was evident, and shipyards in all countries were filled with orders, and existing facilities were inadequate to take care of the business offered. It had been estimated that in order to keep the American Merchant Marine at its existing strength, over one thousand vessels would have to be replaced within the ensuing four years. This country's need for new vessels to replace those rapidly becoming obsolescent in order to maintain the position of the Merchant Marine, and to provide an adequate number of vessels necessary in time of war as auxiliaries to the fleet for other purposes, and the facilities available for building the needed tonnage were studied by Congress, and the Mer- 98
chant Marine Act of 1936 was adopted. Among the provisions of that Act, and the proceedings thereunder, pertinent to an appraisal of the business prospects of UNITED on May 2, 1938, were the following:

(a) A Commission of five members had been created.

(b) The Commission was empowered to advance 75% of the cost of vessels to be constructed, the loans to run for 20 years at 3½% interest, and to make loans for the modernization, improvement and repair of vessels.

(c) The Commission was empowered to absorb the excess costs of American construction and operation of 99
vessels over foreign construction and operation by direct subsidies.

(d) A duty was imposed on the Commission to construct a portion of the needed tonnage on its own account, should private capital fail to do so with the inducements offered.

(e) The Chairman of the Maritime Commission stated at a hearing before the House Committee on

Appropriations that 300 to 350 ships should be built for the overseas trade. As a start toward this end, the Commission had adopted an initial program of construction to be carried out over a period of eighteen months to three years. This program, which had been definitely announced, called for the building of 95 ships, with an estimated deadweight tonnage of 835,000 tons. The list included cargo, passenger ships and tanks, with an estimated cost of over $250,000,000.

(f) The Commission had advertised for bids and had let contracts for twelve cargo vessels at a cost of approximately $24,000,000.

(g) The Chairman of the Commission stated in a public address that with 85% of our merchant vessels "fit for retirement within five years" there could be but "one answer, to build ships—the best and most modern ships—and build them right away". In the opinion of the Chairman, no more enticing field for American capital existed than the shipping industry. He stated, however, should private capital be tardy about availing itself of its opportunities, the Merchant Marine Act empowers the Government to take the initiative in building ships. He added, "the government, with the assistance of the shipping industry, must begin a program which will equip our overseas trade so that it will be second to none in first-class equipment. We are going to lay the keels for new fast ships. And we are going to do it now." (N. Y. Times, May 23rd.)

56. Upon information and belief on May 2, 1938, there was a very substantial probability that there would shortly be a great demand for naval vessels to be built in private yards. The Naval Bill, now a law, authorizing the construc-

tion during the next few years of all classes of ships for the Navy at an aggregate cost of over $1,000,000,000, was then being considered by Congress. UNITED was in a specially favorable position to construct naval vessels, having built a number of destroyers, and certain of its plans and specifications having been accepted by the Navy Department as official, and as the basis for all bids on the type of ship in question. In addition to constructing destroyers, UNITED had bid on at least one light cruiser. 103

57. Upon information and belief, on May 2, 1938, and for some time previous thereto foreign governments were seeking to place orders here for battleships, cruisers and other naval vessels. 104

58. Upon information and belief, on May 2, 1938, due in part at least to the modernization and improvement program of the Maritime Commission and to the necessity for maintaining the new vessels to be constructed, a substantial probability existed that the drydocking and repair business of UNITED would, over the ensuing period, be materially greater and more profitable than at any time during the prior history of the company.

59. On May 2, 1938, the following factors favorably affected the ability of UNITED to prosecute its business profitably and without fear of interruption: 105

(a) its several plants were well located and well equipped to engage competitively in the business of constructing, drydocking, repairing, and effecting structural alterations to vessels and modernizing ves[illegible];

(b) its mortgages and leases had, as aforesaid, been modified and extended on favorable terms, fixed charges

106 *Amended and Supplemental Bill.*

having been drastically reduced and no maturities obtaining until 1946;

(c) its working capital was upwards of $1,000,000;

(d) its credit was good;

(e) its position with respect to labor was good, the management having succeeded in maintaining the principle of open shop in its plants.

Annexed hereto and made a part hereof is the consolidated
107 balance sheet of UNITED and its wholly owned subsidiary as of December 31, 1937.

60. Upon information and belief, the plants of UNITED were appraised by Coverdale & Colpitts at approximately $26,000,000 at the time when the company was launched.

61. Said plants were acquired as of February 28, 1929 at a cost of $18,840,000.

62. In 1933, Sanderson & Porter made for UNITED an appraisal of all or a portion of its properties, but complainants are not advised regarding the scope of said appraisal or the
108 figure arrived at.

63. The value of the plants retained following the rearrangement and consolidation of yards while UNITED was in reorganization as appraised as of February 28, 1929, less depreciation to April 2, 1935, and plus additions at cost to April 2, 1935, was $17,345,135.07.

64. The sound value of the plants of UNITED was appraised as of June 2, 1936 by Baker & Spencer, Inc., Civil Engineers, at $12,329,453.43. Said valuation was accepted

by the Board of Directors of UNITED as the value of the plants as of said date.

65. The value of the plants of UNITED, as so fixed by Baker & Spencer, Inc., with additions at cost, and less amortization and depreciation to December 31, 1937, as accrued in the accounts of the company, was $11,803,276.01.

66. Included in the sale to Bethlehem were inventories other than work in progress, amounting, at lower of cost or market, as of December 31, 1937, to $344,790.68.

67. Upon information and belief, the price fixed in the 110
Bethlehem Contract, $9,320,000, was grossly inadequate.

68. Upon information and belief the sale to Bethlehem was not in the interests of UNITED and of its stockholders generally.

69. Upon information and belief:

Prior to confirmation of the Plan, as aforesaid the Chase Bank held the mortgage on the Shewan Plant and a senior interest in the mortgage on the Crane Plant as security for loans due from Powell and Rogers, a half interest in the mortgage on the property acquired from New York 111
Harbor Dry Dock Company as security for loans due from Aldred & Company, and it owned the mortgage on the Fletcher Plant, and Rogers' company, Moss Estate, Incorporated, held the second mortgage on the Alderton Yard, which he had purchased at approximately twenty cents on the dollar. The two most valuable and profitable plants of UNITED were the Staten Island Plant, where its operations in the construction of new vessels were concentrated, and the Morse Plant, its chief repair plant. As aforesaid, the

New York Harbor Plant had already been closed up and the real estate sold, the Alderton Yard had long since been closed and dismantled, and in the reorganization, the Crane Plant was closed and discontinued. The Chase Bank, Powell, Rogers and Aldred determined that the best opportunity for liquidating their respective interests in the property of UNITED would be by a reorganization in which the Company, of which they were creditors, would continue to have the right to operate the two most valuable plants, the Staten Island and Morse Plants, and the Chase Bank, Powell, Rogers and Aldred would be in a position to sell the entire
113 business and properties of the Company as one unit, including the less valuable plants, when a price should be offered sufficient to cover their respective positions, and conceived and entered into a design to place themselves in a position to effectuate the said purposes, without regard for, and to the detriment of, the rights and interests of UNITED and its stockholders. Pursuant to said design, the Chase Bank, Powell, Rogers and Aldred formulated the Plan, which, as carried out by them as aforesaid, resulted in the issuance of upwards of two-thirds of the Class A stock to or for the account of the Chase Bank, Powell, Rogers, Rogers' company, Moss Estate, Incorporated and Aldred & Company, carrying with it the sole right to vote on a sale of the company's
114 properties, and the right to name all but one member of the Board of Directors. As a further step in said design, the Chase Bank caused Powell and Rogers, its debtors, to open negotiations with Bethlehem in or about May, 1937, two months after entry of the final order terminating the reorganization proceedings. The final steps were the culmination of said negotiations in the Bethlehem Contract, the approval of said contract by the Board of Directors of UNITED, which Board had been named in effect by the Chase Bank, and the ratification thereof by the votes of the Chase Bank, Powell, Rogers, Rogers' company, Moss Estate, Incorporated, and

Aldred & Company as the holders of two-thirds of the Class A stock, at a special meeting of stockholders on May 25, 1935, and transfer of possession of the plants to Bethlehem on June 3, 1938. Assuming UNITED to be dissolved as a result of said sale and the Class A stock to liquidate at the amount of its preference on dissolution, $12.50 per share, the effect of the sale is to

(a) liquidate the balance of the loan due from Powell and Rogers to the Chase Bank which balance amounted to $934,810;

(b) liquidate the loan due from Aldred & Company to the Chase Bank, at least to the extent of $278,112.50;

(c) realize the secret profit of Rogers on the purchase of the Alderton mortgage. If Moss Estate, Incorporated has held the 21,282 shares of Class A stock provided by the Plan to be issued to it in respect of the Alderton mortgage, the profit will be upwards of $185,000;

(d) realize for Powell and Rogers the liquidation premium of 25% on the 178,538 shares of Class A stock issued in respect of their claims for the principal of the Shewan and Crane mortgages, which premiums will amount to $446,345;

(e) realize for Aldred & Company the liquidation premium of 25% on 22,249 shares of Class A stock, issued in respect of their interest in the principal of the New York Harbor Dry Dock Company mortgage, which premium will amount to $55,598;

(f) realize for the Chase bank $668,412.50 out of the Class A shares issued to it on its claim for $499,200 principal and $39,542.40 interest due on the Fletcher mortgage;

(g) realize for the holders of the Staten Island and Morse mortgages, the principal of the mortgages, less a discount of $811,572.06, which discount is extremely moderate in view of the extended maturity, and of the terms of said mortgages, which liberally favor the mortgagor;

(h) wipe out completely the Class B stock.

70. During the period of the negotiations with Bethlehem and the culmination thereof, the seven members of the Board of Directors of UNITED representing the Class A stock, named upon information and belief in effect by the Chase Bank, were Powell, Rogers, Aldred, Hermann G. Place, a vice president of the Chase Bank, Earl G. Hines, a former employee of the Chase Bank and of the Chase Securities Corporation, and representatives of the holders of the mortgages on the Staten Island and Morse plants, respectively George H. Bates, one of the large stockholders in the Staten Island Shipbuilding Company, and Courtland Palmer, attorney for Edward P. Morse, Jr. and others. The so called representative of the Class B stock, chosen by the Proxy Committee of the management and upon information and belief in effect also named by the Chase Bank, was Clarkson Potter, a member of the firm of Hayden, Stone & Company. Neither Mr. Potter nor his firm were stockholders of UNITED, but Hayden, Stone & Company in the Fall of 1937 underwrote with others an issue of $45,000,000 of Bethlehem Steel Corporation debentures. Bethlehem is a subsidiary of Bethlehem Steel Corporation. Upon information and belief, each of said directors had an interest adverse, in the premises, to the corporation, to the stockholders thereof in general, and in particular to complainants as Class B stockholders.

71. Upon information and belief at all times herein mentioned since the reorganization, complainants as Class B

stockholders have had the right to have the business and properties of UNITED operated, subject only to the right of UNITED to sell its assets at a given figure and wind up its affairs, if such course should be found by the Directors to be for the best interest of the corporation and all its stockholders, and should be approved by the holders of two-thirds of the outstanding Class A shares. 121

72. Each of the directors above named, was in the exercise of his powers as such, in general, and in particular in considering the Bethlehem Contract, not a representative of the Class A stock or of the Class B stock, but a trustee for the corporation and all its stockholders, and obliged to act on said contract in such capacity. 122

73. The Chase Bank, Powell, Rogers and Aldred, when they assumed to control the company and its power to sell its properties through exercise of the voting power of two-thirds of the Class A stock to elect seven of the eight members of the Board of Directors and to ratify a contract of sale, placed themselves in a fiduciary position toward the corporation and its other stockholders, and obliged themselves to exercise such power only for the best interests of the corporation and all its stockholders.

74. Upon information and belief in entering into and in effectuating the aforesaid design and more particularly in causing Powell and Rogers to negotiate the Bethlehem Contract, and the Board of Directors to approve the contract, and in voting their two-thirds of the Class A stock in favor of ratification of the contract, the Chase Bank, Powell, Rogers and Aldred acted with the intent of bringing about the effects of the sale alleged in Paragraph 69 hereof in fraud on the interests and rights of UNITED and of the general body of its stockholders, and in particular of complainants. 123

75. The Bethlehem Contract in effect deprives UNITED of the right as well as the means of prosecuting its business, and leaves no alternative to dissolution.

76. The Bethlehem Contract left to UNITED its accounts receivable, its work in progress (to be completed by Bethlehem for the account of UNITED), certain choses in action, certain small parcels of real estate on Staten Island, a real estate mortgage, and sundry other assets, upon information and belief of little worth. If consummation of the Bethlehem Contract has been accomplished without a dollar of expense, and if the assets remaining to UNITED are liquidated without a dollar of shrinkage or expense, there will be for distribution on the Class B stock, per share, 52 cents, each of which shares represents an original investment of $40.

77. Upon information and belief upon completion of the liquidation of said assets there will be nothing for distribution on the Class B stock, and the Class B stock will have no asset value, and the original investment of complainants amounting to upwards of $100,000 will be wholly destroyed unless this Honorable Court shall intervene and grant equitable relief as hereinafter prayed, or as may otherwise seem just.

78. The Bethlehem Contract was specifically subject to ratification by the holders of two-thirds of the Class A stock.

79. Complainants gave notice of their claims to the defendants other than Bethlehem prior to the special meeting of stockholders held on May 25, 1938, at which the Bethlehem Contract was ratified, and to Bethlehem on May 26, 1938.

80. Upon information and belief on June 1, 1938 Bethlehem turned over to UNITED a check for $9,320,000, the

amount of the consideration named in the Bethlehem Contract, but did not deliver said check to UNITED unconditionally under the contract; said check having been delivered under an agreement whereby there would be paid therefrom the amount of the Staten Island and Morse mortgages, and the balance held intact by UNITED pending disposition of the claims of complainants and certain other objecting stockholders.

81. On June 3, 1938, Bethlehem took possession of the plants of UNITED.

82. On June 1, 1938 Bethlehem was on notice that in accepting said check and in agreeing to surrender possessions of said plants, the defendants other than Bethlehem, trustees for the beneficial owners of the properties of UNITED, were acting in fraud upon the rights of said beneficial owners, and that such action was subject to being avoided by such beneficial owners, or some of them, and in particular the complainants, in so far as their rights might otherwise be affected, and Bethlehem knowingly bought no more than the right, title and interest in said assets of the defendants, and of such other stockholders of UNITED as have or may have acquiesced in or adopted the sale.

83. At the special meeting of stockholders held on May 25, 1938 as aforesaid to ratify the Bethlehem Contract, before the vote was taken upon said proposition, complainants NEIRBO, THE A. P. SMITH MANUFACTURING COMPANY and O'BRIEN filed with UNITED statements objecting to said contract and to ratification thereof, and demanding appraisal of, and payment for, their shares.

84. Complainants acted as alleged in Paragraph 83 in order to save their rights under sections 20 and 21 of the New York Stock Corporation Law and did not intend thereby to

waive, and did not waive, their rights asserted in this suit, or any of their other rights or remedies.

85. Complainants have no adequate remedy at law.

WHEREFORE complainants pray:

A. That complainants may be granted leave to file this amended and supplemental bill of complaint, containing matters which transpired after the filing of complainants' original and amended bills, and that the respondents to said amended bill, to wit the defendants other than Bethlehem, may be required to answer this supplemental bill.

B. That Bethlehem may be joined as an additional party defendant and that a supplemental subpoena issue, directed to Bethlehem, requiring Bethlehem to appear and answer this amended and supplemental bill, and be bound by the orders and decrees of the Court in this suit.

C. That it be adjudged and decreed that the defendants are trustees of the equitable interest of complainants in the properties of UNITED, possession of which has been transferred to Bethlehem, and that the defendants shall account to complainants from time to time for the earnings and profit of their said interest.

D. That in the alternative and if this Court shall refuse to grant complainants relief as prayed for in Paragraph C hereof, an order may be made pursuant to sections 20 and 21 of the New York Stock Corporation Law appointing three persons to appraise the value of the stock of complainants NEIRBO, THE A. P. SMITH MANUFACTURING COMPANY and O'BRIEN, as of June 3, 1938 and designating the time and place of the first meeting of said appraisers, with such di-

rections in regard to their proceedings as shall be deemed proper, and that the stock of said complainants shall be appraised by said appraisers pursuant to section 21 of the New York Stock Corporation Law and that said complainants may thereafter have a final order confirming, modifying or rejecting said appraisal as justice and equity may require, and that interest may be awarded on the value of the stock of said complainants from May 25, 1938 and that said complainants may have a decree against UNITED for the payment of the amount finally so fixed.

E. That the complainants may have such other and further relief as to the Court in the premises may seen just and equitable, together with the costs of this suit.

NEIRBO COMPANY,
The A. P. SMITH MANUFACTURING CO.,
DENIS F. O'BRIEN and
EMMA BOURKE, Complainants,
By DENIS F. O'BRIEN.

ROBERT P. WEIL,
Solicitor for Complainants,
50 Broadway,
New York City.

Of Counsel:
LAURENCE A. TANZER,
ROBERT P. WEIL.

136 *Amended and Supplemental Bill.*

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } ss.:

DENIS F. O'BRIEN being duly sworn, deposes and says that he is one of the complainants herein, that he has read the foregoing amended and supplemental bill of complaint and knows it to be true except as to the matters alleged therein upon information and belief, and as to those matters he believes it to be true.

DENIS F. O'BRIEN

137 Sworn to before me this
15th day of July, 1938.

W. P. BAERENRODT,
Notary Public.

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Supplemental Citation.

Eq. Vol. 87, page 117.

THE PRESIDENT OF THE UNITED STATES OF AMERICA to United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, John E. Aldred, The Chase National Bank of the City of New York and Bethlehem Shipbuilding Corporation, Ltd.

GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court, in a suit in Equity, by Neirbo Company, The A. P. Smith Manufacturing Company, Denis F. O'Brien and Emma Bourke, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two HUNDRED AND FIFTY DOLLARS ($250).

WITNESS, Honorable JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 27th day of July in the year One Thousand Nine Hundred and Thirty-eight and of the Independence of the United States the One Hundred and Sixty-third.

CHARLES WEISER,
Clerk.

ROBERT P. WEIL,
50 Broadway,
Solicitor.

[SEAL]

The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken PRO CONFESSO.

CHARLES WEISER,
Clerk.

142 **Marshal's Return of Service on Bethlehem.**

I hereby certify, That on the 28th day of July, 1938, at the City of New York, in my district, I served the within Subpoena in Equity upon the within-named defendant Bethlehem Shipbuilding Corp., Ltd. by exhibiting to William J. Brown, Asst. Secretary at 25 Broadway, N. Y. City the within original, and at the same time leaving with him a copy thereof.

JOHN J. KELLY,
United States Marshal,
Southern District of New York.

148 Dated July 28, 1938.

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Order to Show Cause Why Service of Supplemental Subpoena on Bethlehem Should Not Be Set Aside. 145

(Same Title)

Upon the order of this Court dated July 26, 1938, and filed herein on July 26, 1938, the supplemental equity subpoena herein dated July 27, 1938, the marshal's return of service of said supplemental equity subpoena, dated July 28, 1938, upon the defendant Bethlehem Shipbuilding Corporation, Ltd., the amended and supplemental bill of complaint herein, verified July 15, 1938, the annexed affidavit of William D. Whitney, sworn to August 12, 1938, and upon all the proceedings heretofore had herein and all of the papers heretofore filed herein, and upon motion of Cravath, deGersdorff, 146
Swaine & Wood, solicitors for Bethlehem Shipbuilding Corporation, Ltd., named herein as a defendant, appearing specially herein solely for the purpose of this application and motion,

Let the complainants or their solicitor show cause before this Court at a stated term thereof for the hearing of motions, to be held in Room 506, United States Court House, Foley Square, in the Borough of Manhattan, City and State of New York, on the 23rd day of August, 1938, at ten-thirty o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and filed herein, setting aside, vacating and quashing the marshal's said return of service upon said Bethlehem Shipbuilding Corporation, Ltd., and setting aside, vacating and quashing the attempted service of said supplemental equity subpoena upon said Bethlehem Shipbuilding Corporation, Ltd., upon the following grounds, among others, to wit: 147

1. Because, as appears from said amended and supplemental bill of complaint, said Bethlehem Shipbuilding Corporation, Ltd., is not a citizen or inhabitant of, nor a resident within the State of New York or the Southern District of New York;

148 *Order to Show Cause Why Service of Supplemental Subpoena on Bethlehem Should Not Be Set Aside.*

2. Because, as appears from said amended and supplemental bill of complaint, said Bethlehem Shipbuilding Corporation, Ltd., is a citizen and inhabitant of, and a resident within, the State of Delaware;

3. Because, as appears from said amended and supplemental bill of complaint, each of the complainants herein is a citizen and inhabitant of, and resident within, the State of New Jersey;

149 4. Because, as appears from said amended and supplemental bill of complaint, neither of the complainants herein is a citizen or inhabitant of, nor a resident within, the State of New York or the Southern District of New York, and said Bethlehem Shipbuilding Corporation, Ltd., is neither a citizen or inhabitant of, nor a resident within, said State of New York or the Southern District of New York; and

5. Because, as appears from said amended and supplemental bill of complaint, this suit is brought in a District of which neither the complainants nor said Bethlehem Shipbuilding Corporation, Ltd., is a citizen, inhabitant or resident;

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and sufficient reason appearing therefor, it is

FURTHER ORDERED, that complainants be, and they hereby are, directed to serve copies of all papers and affidavits to be used in answering this motion upon Messrs. Cravath, deGersdorff, Swaine & Wood, at their office, No. 15 Broad Street, New York, N. Y., at or before one o'clock in the afternoon on August 20, 1938, and sufficient reason appearing therefor, it is

Order to Show Cause Why Service of Supplemental Subpoena on Bethlehem Should Not Be Set Aside.

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FURTHER ORDERED, that the time within which said Bethlehem Shipbuilding Corporation, Ltd., shall be required to appear generally, answer, or make any motion with respect to said amended and supplemental bill of complaint herein be, and it hereby is, extended to and including the 20th day after service upon Messrs. Cravath, deGersdorff, Swaine & Wood at their office aforesaid, of a copy of the order of this Court finally determining this motion, with notice of the filing thereof, if this motion be denied, and sufficient reason appearing therefor, it is

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FURTHER ORDERED, that service of a copy of this order, together with a copy of the annexed affidavit, on complainants' solicitor on August 15th, 1938, shall be deemed sufficient.

Dated, New York, N. Y.
August 13, 1938.

JOHN W. CLANCY,
U. S. D. J.

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154 **Affidavit in Support of Order to Show Cause.**

(Same Title)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILLIAM D. WHITNEY, being duly sworn, deposes and says:

I am an attorney and counselor at law duly admitted to practice in all the courts of the State of New York and in this Court. I am a partner in the firm of Cravath, deGersdorff, Swaine & Wood, solicitors for Bethlehem Shipbuilding Corporation, Ltd. (hereinafter sometimes referred to as Bethlehem) named herein as a party defendant and appearing solely and specially for the purpose of this application
155 and motion.

On or about July 26, 1938, complainants in the above-entitled suit secured an order of this Court which, *inter alia*, (1) approved the filing by said complainants of an amended and supplemental bill of complaint, (2) joined Bethlehem as party defendant and (3) directed the issuance of a supplemental subpoena addressed to Bethlehem. On or about July 28, 1938, a supplemental equity subpoena dated July 27, 1938 was purportedly served on Bethlehem as recited in the marshal's return of service filed herein.

It appears on the face of said amended and supplemental bill of complaint that each of the complainants herein is a citizen and resident of the State of New Jersey (Pars. 1 to
156 4, inclusive) and that Bethlehem is a corporation organized and existing under the laws of the State of Delaware and a citizen and resident of said State (Par. 7). Bethlehem has not appeared generally in this suit, and has not consented to, or in any other manner waived its right to object to, its joinder as a defendant herein.

August 17, 1938 is the twentieth day after the attempted service of said supplemental equity subpoena on Bethlehem. Since the present motion will not be heard or determined until after said date, and since said amended and supplemental bill of complaint is extremely voluminous, I respectfully request that provision be made in the order to show cause hereby requested for an extension of Bethlehem's time to appear generally, answer or make any motion with respect

to said amended and supplemental bill of complaint for twenty days after service upon the solicitors for Bethlehem appearing specially herein of a copy of the order of this Court finally determining the motion brought on by said order to show cause, with notice of the filing thereof, if said motion be denied.

Since, in my opinion, the objection of Bethlehem to the venue of this action is sound as a matter of law, and no legally sufficient answer thereto can be made by complainants, I further request, in order to avoid surprise at the argument of the motion, that the order to show cause hereby applied for contain a provision requiring the complainants to serve copies of all papers and affidavits they shall desire to use in answering this motion upon the solicitors for Bethlehem, appearing specially herein, at or before one P. M. on August 20, 1938.

WHEREFORE, I respectfully request that complainants be directed to show cause why an order should not be made and filed herein setting aside, vacating and quashing the marshal's return of service of the supplemental equity subpoena issued herein upon Bethlehem Shipbuilding Corporation, Ltd. and setting aside, vacating and quashing the attempted service of said supplemental equity subpoena upon said Bethlehem Shipbuilding Corporation, Ltd.

No previous application for the relief requested herein has been made to this or any other Court or Judge.

WILLIAM D. WHITNEY.

Sworn to before me this
12th day of August, 1938.

ARTHUR NEWMAN
Notary Public, Kings County
Kings Co. Clerk's No. 170 Reg. No. 9072
N. Y. Co. Clerk's No. 171 Reg. No. 9N109
Bronx Co. Clerk's No. 15 Reg. No. 37N39
Queens Co. Clerk's No. 1785 Reg. No. 6915
Certificates filed also in
Richmond and Westchester Counties
Commission expires March 30, 1939

160 **Affidavit in Opposition to Bethlehem's Motion.**

(Same Title)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

ROBERT P. WEIL being duly sworn, deposes and says:

1. I am the solicitor for the complainants herein and make this affidavit in opposition to the motion of the defendant BETHLEHEM SHIPBUILDING CORPORATION, LTD. (hereinafter referred to as "Bethlehem") for an order setting aside service upon Bethlehem of a supplemental subpoena, issued herein pursuant to the order of the Court dated July 26, 1938.

161 2. Upon information and belief: On or about March 6, 1918 Bethlehem, a Delaware corporation, received from the Secretary of State of New York a certificate authorizing Bethlehem to do business in the State of New York and at all times since that date said certificate has been, and now is, held by Bethlehem. To obtain said certificate, Bethlehem, pursuant to due corporate action, filed with the Secretary of State of New York a statement and designation as required by law designating Thomas A. McDonald of 111 Broadway, New York City as the person upon whom process might be served in the State of New York in any action or proceeding against Bethlehem. Said designation remained outstanding as originally filed until on or about June 21,
162 1918 when Bethlehem, pursuant to due corporate action, filed a certificate revoking the designation of Thomas A. McDonald and designating William J. Brown in his place as the person upon whom process might be served in the State of New York in any action or proceeding against Bethlehem. Thereafter, said last mentioned designation has remained outstanding unchanged in all respects except that on June 16, 1922 Bethlehem, pursuant to due corporate action, filed a further certificate changing the address of its principal office in the State of New York from 111 Broadway, New York City to 25 Broadway, New York City, its present address.

3. Upon information and belief: At 25 Broadway, New York City, in the Southern District of New York, Bethlehem has a permanent office at which it regularly transacts its business, and Bethlehem is permanently present in the Southern District of New York for the conduct of its corporate business. In addition to being its chief business office, said office at 25 Broadway is in a factual sense the corporate domicile of Bethlehem, since at that place and at no other place, the Board of Directors of Bethlehem meet to conduct its business, the chief executive officers of the company have their permanent offices, and the chief books and records of a general corporate and business nature are kept.

4. Upon information and belief: Bethlehem, in a factual sense, is not present in the State of Delaware. Its statutory office is a mere nominal one, consisting of a listing with the Corporation Trust Company. Bethlehem has no plants or other property of a substantial and permanent nature in Delaware.

5. Upon information and belief: The acts, with the commissions of which Bethlehem is charged in the amended and supplemental bill of complaint, were performed mainly, if not wholly, in the State of New York and in the Southern District of New York.

ROBERT P. WEIL.

Sworn to before me this
20th day of August, 1938.

HARRY FRANK
Notary Public, Kings Co. No. 138, Reg. No. 245
Cert. filed in N. Y. Co. No. 348, Reg. No. O-F-207
Cert. filed in Bronx Co. No. 12, Reg. No. 79-F-40
Cert. filed in Queens Co. No. 314, Reg. No. 1916
Cert. filed in Richmond County
Cert. filed in Westchester County
My Commission expires March 30, 1940

166 **Certificate of Authority of Bethlehem to do Business in New York.**

STATE OF NEW YORK

OFFICE OF THE

SECRETARY OF STATE

CERTIFICATE OF AUTHORITY
To do business in New York State

IT IS HEREBY CERTIFIED, That BETHLEHEM SHIPBUILDING CORPORATION, LTD., which appears from the papers filed in this office on the sixth day of March, 1918, to be a foreign stock corporation organized and existing under the laws of
167 the State of Delaware, has complied with all the requirements of law to authorize it to do business in this State, and that the business of such corporation to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State for such or similar business.

WITNESS, my hand and the seal of office of the Secretary of State, at the City of Albany, this 6th day of March, 1918.

C. W. TAFT,
(L. S.) Second Deputy Secretary of State.

STATE OF NEW YORK
168 DEPARTMENT OF STATE } ss.:

I CERTIFY That I have compared the preceding copy with the record in this department of the certificate of authority issued on the 6th day of March, 1918, to the BETHLEHEM SHIPBUILDING CORPORATION, LTD., and that such copy is a correct transcript therefrom and of the whole of such record.

WITNESS my hand and the official seal of the Department of State, at the City of Albany, this eighteenth day of August, one thousand nine hundred and thirty-eight.

FRANK S. SHARP,
(Seal) Deputy Secretary of State.

Statement and Designation by Bethlehem.

STATE OF NEW YORK

TAX DEPARTMENT

ALBANY, Mar. 5, 1918.

THE HONORABLE THE SECRETARY OF STATE
ALBANY, N. Y.

DEAR SIR:

Enclosed herewith please find application of Bethlehem Shipbuilding Corp. Ltd. of Delaware, for a certificate to do business in the State of New York.

As the above-mentioned company has not been doing business in the State of New York for a period of one year, the amount of capital upon which the license fee is based will not be determined until the expiration of the time provided by Section 181, Chapter 908, Laws of 1896, and acts amendatory thereof.

Respectfully yours,

JOHN J. MERRILL,
Tax Commissioner.

(Enclosure)

BETHLEHEM SHIPBUILDING CORPORATION, LTD.
STATEMENT AND DESIGNATION.

(Pursuant to Section 16 of the General Corporation Law of the State of New York).

Pursuant to the provisions of Section 16 of the General Corporation Law of the State of New York, Bethlehem Shipbuilding Corporation, Ltd., a stock corporation, organized and existing under and by virtue of the laws of the State of

172 *Statement and Designation by Bethlehem.*

Delaware, does hereby make a statement and designation under its corporate seal to be filed with the annexed sworn copy of its amended certificate of incorporation, as follows, to-wit:

FIRST: The business or objects of said Corporation, which it is engaged in carrying on, or which it proposes to carry on, within the State of New York, are as follows:

(a) To design, build, construct, repair, operate, maintain, buy, sell, charter or otherwise manage, deal or traffic in ships, boats and vessels of all kinds, and their
178 equipment, furnishings and appurtenances, armor and armament, boilers, engines, tackle and apparel; together with all materials, articles, tools, machinery, docks and appliances entering into or suitable and convenient for the construction, equipment, maintenance or operation thereof.

(b) To construct or purchase or otherwise acquire, buildings, machinery, engines, apparatus, locomotives, cars, railroad equipment, railroads, docks, slips, elevators, water works, gas works, electric works, bridges, viaducts, acqueducts, canals and any other waterways and any other means of transportation, and to sell or
74 otherwise dispose thereof, or to maintain or operate the same.

(c) To manufacture, buy, sell or otherwise deal or traffic in ordinance, large and small arms, armor, armor plate, explosives, munitions and stores of war; and military, naval, maritime, marine and submarine materials, substances, appliances, engines, articles and contrivances of any and every sort.

(d) To manufacture, buy, sell or otherwise deal or traffic in, iron, steel, manganese, nickel, copper, coke,

coal, lumber and other metals, minerals or materials, and all or any products or articles consisting or partly consisting of iron, steel, manganese, nickel, copper, coal, coke, lumber or other metals, minerals or materials.

(e) To acquire, own, lease, occupy, use, develop, or deal in, any lands containing coal, iron, manganese, nickel, copper, stone, or other ores or minerals, gas or oil, and in wood lands or other lands; and to mine or otherwise extract or to remove, coal, ores, stone, timber, gas, oil or other minerals, materials or substances from any lands.

(f) To transport goods, merchandise and passengers upon land or water; to own, operate and maintain steamship lines, vessel or other lines for water transportation; to construct, purchase, lease or otherwise acquire, maintain, operate or use wharves, warehouses, piers, docks, dry-docks, floating-docks, and all other structures, buildings or works.

SECOND: The place within the State of New York which is to be the principal place of business of said Corporation is No. 111 Broadway, Borough of Manhattan, City of New York.

THIRD: Said Corporation hereby designates Thomas A. McDonald as the person upon whom a summons may be served within the State of New York, or any process or other paper whereby a special proceeding is commenced in a court or before an officer, except a proceeding to punish for contempt and except where special provision for the service thereof is otherwise made by law.

FOURTH: Said Thomas A. McDonald, so designated, has an office and place of business at No. 111 Broadway, in the Borough of Manhattan, City of New York, the place where

178 *Statement and Designation by Bethlehem.*

said Corporation is to have its principal place of business within the State of New York, as aforesaid.

FIFTH: The written consent of said Thomas A. McDonald to such designation, duly signed and acknowledged, is hereto annexed.

IN WITNESS WHEREOF, Bethlehem Shipbuilding Corporation, Ltd., the Corporation hereinbefore mentioned and described, has caused this instrument to be executed by its President, or one of its Vice-Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary or
179 one of its Assistant Secretaries, this 13th day of February, 1918.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

By J. W. POWELL,
Vice President.

Attest:
R. W. ROBERTS,
Assistant Secretary.

(Seal)

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Statement and Designation by Bethlehem. 181

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF NORTHAMPTON, } ss.:

On the 13th day of February, in the year 1918, before me personally came J. W. Powell, to me known, who, being by me duly sworn, did depose and say: That he resides in Bethlehem, Commonwealth of Pennsylvania; that he is the Vice President of Bethlehem Shipbuilding Corporation, Ltd., the corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order. 182

H. M. WITEMEYER,
Notary Public.
Commission expires at end of next session of Senate.

(Seal)

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF NORTHAMPTON, } ss.:

On the 13th day of February, in the year 1918, before me personally came J. W. Powell, to me known, who, being by me duly sworn, did depose and say: That he resides in Bethlehem, Commonwealth of Pennsylvania; that he is the Vice President of Bethlehem Shipbuilding Corporation, Ltd., the corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order. 183

H. M. WITEMEYER.

184 *Statement and Designation by Bethlehem.*

STATE OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

I, THOMAS A. L. HAY, Prothonotary in and for the County of Northampton and Clerk of the Court of Common Pleas, do hereby certify, that the said Court is a Court of Record; that I have official cognizance of the fact, that H. M. WITEMEYER, Esq., before whom the foregoing was taken, was at the time of taking such, a NOTARY PUBLIC in and for said County, and a resident thereof, duly commissioned and qualified and duly authorized and empowered to take and certify oaths and affirmations
185 (Seal) and the proof and acknowledgment of deeds by the laws of said State of Pennsylvania. And further, that I am well acquainted with the hand-writing of such NOTARY PUBLIC and verily believe that the signature to the said acknowledgment is genuine. I further certify, that the said instrument is executed and acknowledged in all respects according to the laws of the State of Pennsylvania. That his commission is dated September 7th, 1917, and will expire at end of next session of Senate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said office, at Easton, this 13th day of February, A. D. 1918.

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THOMAS A. L. HAY,
Prothonotary.

I, Thomas A. McDonald, the person designated in the foregoing instrument as the person upon whom a summons, or any process as therein mentioned, against Bethlehem Shipbuilding Corporation, Ltd., may be served within the State of New York, do hereby consent to such designation.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of February, 1918.

T. A. MCDONALD

Statement and Designation by Bethlehem. 187

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On this 18th day of February, 1918, before me personally came THOMAS A. MCDONALD, to me known and known to me to be the person described in and who signed the foregoing consent, and he duly acknowledged to me that he signed and executed the same.

J. H. WARD
Notary Public, Kings County No. 87
Certificate filed in New York Co. No. 180 188
New York County Register No. 8161
Commission expires March 30, 1918

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190 *Statement and Designation by Bethlehem.*

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE.

CERTIFICATE OF INCORPORATION,

As Modified and Amended

by

191 Agreement and Indenture of Consolidation, dated October 30, 1917.

CERTIFICATE OF INCORPORATION

OF

BETHELEHEM SHIPBUILDING CORPORATION, LTD.

As Modified and Amended by Agreement and Indenture of Consolidation, dated October 30, 1917.

192 We, the undersigned, for the purpose of associating to establish a corporation for the transaction of the business and the promotion and conduct of the objects and purposes hereinafter stated, under the provisions of, and subject to the requirements of, the laws of the State of Delaware (particularly an act entitled "An Act providing a General Corporation Law," approved March 10, 1899, and the acts amendatory thereof and supplemental thereto, and known as the "General Corporation Law of the State of Delaware"), do make, record and file this certificate of incorporation in writing and do hereby certify as follows to wit:

Statement and Designation by Bethlehem.

FIRST: The name of the corporation is BETHLEHEM SHIPBUILDING CORPORATION, LTD.

SECOND. The respective names of the county and of the city within the county in which the principal office and place of business of the corporation is to be located in the State of Delaware are the County of New Castle and City of Wilmington. The name of the resident agent of the corporation in charge thereof upon whom legal process against the corporation may be served is Corporation Trust Company of America. The street and number of said principal office and place of business and the address by street and number of said resident agent is Number 7 West Tenth Street in said City of Wilmington.

THIRD. The nature of the business of the corporation and the objects and purposes to be transacted, promoted or carried on by it are as follows:

(*a*) To design, build, construct, repair, operate, maintain, buy, sell, charter or otherwise manage, deal or traffic in ships, boats and vessels of all kinds, and their equipment, furnishings and appurtenances, armor and armament, boilers, engines, tackle and apparel; together with all materials, articles, tools, machinery, docks and appliances entering into or suitable and convenient for the construction, equipment, maintenance or operation thereof.

(*b*) To construct or purchase or otherwise acquire, buildings, machinery, engines, apparatus, locomotives, cars, railroad equipment, railroads, docks, slips, elevators, water works, gas works, electric works, bridges, viaducts, aqueducts, canals and any other waterways and any other means of transportation, and to sell or otherwise dispose thereof, or to maintain or operate the same.

196 *Statement and Designation by Bethlehem.*

(*c*) To manufacture, buy, sell or otherwise deal or traffic in ordinance, large and small arms, armor, armor plate, explosives, munitions and stores of war; and military, naval, maritime, marine and submarine materials, substances, appliances, engines, articles and contrivances of any and every sort.

(*d*) To manufacture, buy, sell or otherwise deal or traffic in, iron, steel, manganese, nickel, copper, coal, coke, lumber and other metals, minerals or materials, and all or any products or articles consisting or partly
197 consisting of iron, steel, manganese, nickel, copper, coal, coke, lumber or other metals, minerals or materials.

(*e*) To acquire, own, lease, occupy, use, develop or deal in, any lands containing coal, iron, manganese, nickel, copper, stone, or other ores or minerals, gas or oil, and in wood lands or other lands; and to mine or otherwise extract or to remove, coal, ores, stone, timber, gas, oil or other minerals, materials or substances from any lands.

(*f*) To transport goods, merchandise and passengers upon land or water; to own, operate and maintain steam-
198 ship lines, vessels or other lines for water transportation; to construct, purchase, lease or otherwise acquire, maintain, operate or use wharves, warehouses, piers, docks, dry-docks, floating-docks, and all other structures, buildings or works.

(*g*) To apply for, obtain, register, purchase, lease or otherwise to acquire, and to hold, use, own, exercise, develop, operate and introduce, and to sell, assign, grant licenses in respect of, or otherwise dispose of, any trade marks, trade names, patents, or inventions, improve-

ments or processes used in connection with or secured under letters patent of the United States or elsewhere, or otherwise, in relation to any of the other purposes herein stated; and to acquire, use, exercise, or otherwise turn to gain licenses in respect of any such trade marks, patents, inventions, processes and the like or any such property or rights.

(*h*) To engage in any manufacturing, mining, construction, transportation or other business connected with any of the purposes herein stated, but not to engage in any business hereunder which shall require the exercise of the right of eminent domain within the State of Delaware.

(*i*) To enter into any contracts or arrangements with any government or authority, national, state, municipal, local or otherwise, conducive to the other purposes herein stated, and to obtain from any such government or authority any and all rights, privileges, grants or concessions relating to any of the objects herein stated; to carry out, exercise, comply with and enforce any such contracts, rights, privileges and concessions; to subscribe for, acquire, invest in, sell or dispose of any bonds, securities or obligations of any nature issued by any such government or authority or guaranteed thereby.

(*j*) To borrow money; to issue bonds, debentures or obligations of the corporation from time to time, for moneys borrowed or in payment for property purchased or for any of the other objects or purposes of the corporation; to secure the same by mortgage or mortgages or deed or deeds of trust upon or pledge of any or all of the property, rights, privileges, or franchises of the corporation, wheresoever situated, acquired or to be acquired;

202 *Statement and Designation by Bethlehem.*

and to sell or otherwise dispose of any or all such bonds, debentures and obligations.

(*k*) To conduct its business in all or any of its branches in the State of Delaware and in other States of the United States of America, and in the territories and the District of Columbia, and in any or all dependencies, colonies or possessions of the United States of America, and in foreign countries; and for or in connection with such business, to hold, possess, purchase, mortgage and convey real and personal property and to maintain offices and agencies either within or anywhere without the State of Delaware.

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(*l*) The board of directors shall have plenary power and discretion to sell, lease or otherwise dispose of, from time to time, any part or parts of the properties of the corporation and to cease to conduct the business connected therewith or again to resume the same, as it may deem best.

It is the intention that the objects and purposes specified in the foregoing clause of this Article Third, shall, except where otherwise expressed in this Article, be in no wise limited or restricted by reference to, or inference from, the terms of any other clause of this or any other article in this certificate, but that the objects and purposes specified in each of the clauses of this Article shall be regarded as independent objects and purposes.

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It is also the intention that said clauses be construed as powers as well as objects and purposes; and, generally, that the corporation shall be authorized to exercise and enjoy all other powers, rights and privileges granted by the aforesaid act, entitled "An Act providing a General Corporation Law," which was approved March

10, 1899, to corporations of this character, and all the powers conferred upon such corporations by the then existing laws of the State of Delaware, so far as not in conflict therewith, or which may be conferred by all acts heretofore or hereafter amendatory of said Act of March 10, 1899, or of said laws, or supplemental thereto, but the enumeration of certain powers as herein specified is not intended as exclusive of, or as a waiver of, any of the powers, rights or privileges granted or conferred by said Act of March 10, 1899, or the laws of said State now or hereafter in force; provided, however, that the corporation shall not have the power to carry on the business of constructing, maintaining or operating railroads or railways within the State of Delaware; nor shall it possess the right of taking and condemning lands in the State of Delaware. The corporation shall not carry on any business, nor exercise any powers, in any state, territory or country, which a similar corporation organized under the laws of such state, territory or country could not carry on or exercise, except to the extent permitted or authorized by the laws of such state, territory or country.

FOURTH. The amount of the total authorized capital stock of the corporation is Fifteen million five hundred thousand dollars ($15,500,000), the number of shares into which the same is divided is One hundred and fifty-five thousand (155,000), and the par value of each share thereof is One hundred dollars ($100). The amount of capital stock with which the corporation will commence business is One hundred thousand dollars ($100,000).

FIFTH. The name and place of residence of each of the original subscribers to the capital stock and the number of shares subscribed for by each are as follows:

Statement and Designation by Bethlehem.

Names	Places of Residence	Number of Shares of Capital Stock
A. N. Roberts,	Bethlehem, Penn.	340
H. R. Walters,	do do	330
W. L. Lewis,	do do	330

SIXTH. The corporation is to have perpetual existence.

SEVENTH. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever, except as may be otherwise expressly provided by law.

EIGHTH: The number of directors of the corporation shall be fixed from time to time by the by-laws, but shall not be less than three.

NINTH: The following provisions are hereby adopted for the regulation of the business and the conduct of the affairs of the corporation and for the purpose of creating, defining and regulating the powers of the directors and of the stockholders:

(*a*) The board of directors shall have the power to make, alter, amend and repeal the by-laws of the corporation. Any by-laws of the corporation, whether made by the board of directors or by the stockholders, may be altered or repealed by the stockholders.

(*b*) Subject to the provisions of the by-laws, the board of directors shall have power to fix, from time to time, the amount of the profits of the corporation to be reserved as working capital or for any other lawful purpose.

(*c*) The board of directors shall have power to determine, from time to time, whether and to what extent

and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by the laws of the State of Delaware, unless and until authorized so to do by resolution of the board of directors or stockholders of the corporation.

(*d*) The board of directors shall have power, without the assent or vote of the stockholders, to authorize and to cause to be executed mortgages and liens upon the real and personal property of the corporation, including after-acquired property. 212

(*e*) The board of directors shall have power to sell, lease or exchange all of the property and assets of the corporation, including its good-will and its corporate franchises, upon such terms and conditions as the board shall deem expedient and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of a majority of the stock issued and outstanding given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of a majority of the holders of the stock issued and outstanding. 213

(*f*) Any director or any officer elected or appointed by the stockholders or by the board of directors may be removed at any time in such manner as shall be provided in the by-laws of the corporation.

(*g*) Elections shall be by ballot whenever requested by any person entitled to vote, but unless so requested may be conducted in any way approved at the meeting of the stockholders at which such election is held.

Statement and Designation by Bethlehem.

(*h*) The stockholders shall have power to hold their meetings within or without the State of Delaware at such places as from time to time may be designated by the by-laws or as therein provided; and the board of directors shall have power to hold its meetings at such places whether within or without said State as from time to time shall be designated by resolution of the board.

(*i*) The corporation shall have power, subject to the provisions of the laws of the State of Delaware and of the by-laws of the corporation, to keep the books of the corporation outside of said State at such places as may from time to time be designated by resolution of the board of directors.

(*j*) In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the board of directors may exercise all such powers and do all such acts and things as may be exercised or done by the corporation; subject, nevertheless, to the provisions of the laws of the State of Delaware, of this certificate, and of the by-laws of the corporation.

TENTH: No contract or other transaction between this corporation and any other corporation and no act of this corporation shall in any way be affected or invalidated by the fact that any of the directors of this corporation are pecuniarily or otherwise interested in, or are directors or officers of, such other corporation; any director individually, or any firm of which any director may be a member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of this corporation, provided that the fact that he or such firm is so interested shall be disclosed or shall have been known to the board of directors or a majority thereof; and any director of this corporation who is also a director or officer of such other corporation or who is so in-

terested may be counted in determining the existence of a quorum at any meeting of the board of directors of this corporation which shall authorize any such contract or transaction, and may vote thereat to authorize any such contract or transaction, with the like force and effect as if he were not such director or officer of such other corporation or not so interested.

IN WITNESS WHEREOF, we, the undersigned, being all of the original subscribers to the capital stock hereinbefore mentioned, do certify that the facts hereinbefore stated are true, and do respectively agree to take the number of shares of 218
stock hereinbefore set opposite our respective names, and have accordingly hereunto set our respective hands and seals this 15th day of October, nineteen hundred and seventeen.

A. N. ROBERTS [SEAL.]
H. R. WALTERS [SEAL.]
W. L. LEWIS [SEAL.]

In the presence of:
S. WOODWARD

219

220 *Statement and Designation by Bethlehem.*

STATE OF DELAWARE,
COUNTY OF NEW CASTLE, } ss.:

BE IT REMEMBERED, that on this 15th day of October, A. D. 1917, personally appeared before me Charles G. Guyer, a Notary Public in and for the County and State aforesaid, A. N. Roberts, H. R. Walters, and W. L. Lewis, parties to the foregoing certificate of incorporation, known to me personally to be such, and I having first made known to them and each of them the contents of said certificate, they did each severally acknowledged said certificate to be the act and
221 deed of the signers, respectively, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year last aforesaid.

CHARLES G. GUYER,
Notary Public.

CHARLES G. GUYER,
Notary Public,
Appointed February 10, 1915
State of Delaware
Term Four Years

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COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

A. N. ROBERTS, being duly sworn, deposes and says, that he is an Assistant Secretary of BETHLEHEM SHIPBUILDING CORPORATION, LTD., a corporation organized under the Laws of the State of Delaware, and that the foregoing is a true and complete copy of the amended Certificate of Incorporation of said Corporation as last amended.

A. N. ROBERTS

Subscribed and sworn to before me this 13th day of February, 1918. } 224

H. M. WITEMEYER
Notary Public
Commission expires at end of next session of Senate.

(Seal)

STATE OF NEW YORK
DEPARTMENT OF STATE } ss.:

I CERTIFY That I have compared the preceding copy with the original Statement and Designation by Bethlehem Shipbuilding Corporation, Ltd., filed in this department on the 6th day of March, 1918, and that such copy is a correct transcript therefrom and of the whole of such original. 225

WITNESS my hand and the official seal of the Department of State, at the City of Albany, this twentieth day of August, one thousand nine hundred and thirty-eight.

FRANK S. SHARP,
Deputy Secretary of State.

226 *Statement and Designation by Bethlehem.*

STATE OF PENNSYLVANIA, }
COUNTY OF NORTHAMPTON, } ss.:

I, THOMAS A. L. HAY, Prothonotary in and for the County of Northampton and Clerk of the Court of Common Pleas, do hereby certify, that the said Court is a Court of Record; that I have official cognizance of the fact, that H. M. Witemeyer, Esq., before whom the foregoing was taken, was at the time of taking such, a NOTARY PUBLIC in and for said County, and a resident thereof, duly commissioned and qualified and duly authorized and empowered to take and
227 certify oaths and affirmations and the proof and acknowledgment of deeds by the laws of said State of Pennsylvania. And further, that I am well acquainted with the hand-writing of such NOTARY PUBLIC and verily believe that the signature to the said acknowledgment is genuine. I further certify, that the said instrument is executed and acknowledged in all respects according to the laws of the State of Pennsylvania. That his commission is dated September 7th, 1917, and will expire at end of next session of Senate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said office, at Easton, this 13th day of February, A. D. 1918.

228

THOMAS A. L. HAY,
Prothonotary.

(Seal)

Certificate of Revocation and New Designation.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

Revocation of Designation.

(Pursuant to Section 16 of the General Corporation Law of the State of New York.)

Pursuant to the provisions of Section 16 of the General Corporation Law of the State of New York, Bethlehem Shipbuilding Corporation, Ltd., a stock corporation, organized and existing under and by virtue of the laws of the State of Delaware, under its corporate seal, does hereby revoke the designation heretofore made by virtue of a Statement and Designation under date of February 13, 1918, and does hereby make a designation in lieu thereof, as follows to wit:

FIRST: Said corporation hereby revokes the designation of Thomas A. McDonald as the person upon whom summons may be served within the State of New York, or any process or other paper whereby a special proceeding is commenced in a court or before an officer, as set forth in paragraph THIRD of said Statement and Designation.

SECOND: The place of business within the State of New York which is to be the principal place of business of said corporation is No. 111 Broadway, Borough of Manhattan, City of New York.

THIRD: Said corporation hereby designates William J. Brown as the person upon whom a summons may be served within the State of New York, or any process or other paper whereby a special proceeding is commenced in a court or before an officer, except a proceeding to punish for contempt and except where special provision for the service thereof is otherwise made by law.

FOURTH: Said William J. Brown, so designated, has an office and place of business at No. 111 Broadway, Borough of Manhattan, City of New York, the place where said cor-

poration is to have its principal place of business within the State of New York, as aforesaid.

FIFTH: The written consent of said William J. Brown to such designation, duly signed and acknowledged, is hereto annexed.

IN WITNESS WHEREOF, Bethlehem Shipbuilding Corporation, Ltd., the corporation hereinbefore mentioned and described, has caused this instrument to be executed by its President, or one of its vice-presidents and its corporate seal to be hereunto affixed, this 14th day of June, 1918.

233 BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

J. W. POWELL
Vice-President (SEAL)

Attest:
A. N. ROBERTS,
Assistant Secretary.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

On the 14th day of June, 1918, before me personally came J. W. Powell, to me known, who, being by me duly sworn, did depose and say: That he resides in Bethlehem, Pennsylvania; that he is the Vice President of Bethlehem Shipbuilding Corporation, Ltd., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order.

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H. M. WITMEYER,
Notary Public,
Commission expires at end of next session of Senate

Certificate of Revocation and New Designation.

STATE OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

I, THOMAS A. L. HAY, Phothonotary in and for the County of Northampton and Clerk of the Court of Common Pleas, do hereby certify, that the said Court is a Court of Record; that I have official cognizance of the fact, that H. M. WITEMEYER, Esq., before whom the foregoing was taken, was at the time of taking such, a NOTARY PUBLIC in and for said County, and a resident thereof, duly commissioned and qualified and duly authorized and empowered to take and certify oaths and affirmations and the proof and acknowledgment of deeds by the laws of said State of Pennsylvania. And further, that I am well acquainted with the hand-writing of such NOTARY PUBLIC and verily believe that the signature to the said acknowledgment is genuine. I further certify, that the said instrument is executed and acknowledged in all respects according to the laws of the State of Pennsylvania. That his commission is dated September 7th, 1917, and will expire at end of next session of Senate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said office, at Easton, this 15th day of June A. D. 1918.

THOMAS A. L. HAY,
Prothonotary.

(SEAL)

I, William J. Brown, the person designated in the foregoing instrument, as the person upon whom a summons, or any process as therein mentioned, against Bethlehem Shipbuilding Corporation, Ltd., may be served within the State of New York, do hereby consent to such designation.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of June, 1918.

WM. J. BROWN.

238 *Certificate of Revocation and New Designation.*

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On this 12th day of June, 1918, before me personally came William J. Brown, to me known and known to me to be the person described in and who signed the foregoing consent, and he duly acknowledged to me that he signed and executed the same.

J. H. WARD,
Notary Public.

239 Notary Public, Kings County, No. 65
Kings County Register No. 159
Certificate filed in New York Co. No. 176
New York County Register No. 10140
Commission expires March 30, 1920

(L. S.)

STATE OF NEW YORK
DEPARTMENT OF STATE } ss.:

I CERTIFY That I have compared the preceding copy with the original Certificate of Revocation and New Designation
240 of Bethlehem Shipbuilding Corporation, Ltd., filed in this department on the 21st day of June, 1918, and that such copy is a correct transcript therefrom and of the whole of such original.

WITNESS my hand and the official seal of the Department of State at the City of Albany, this twentieth day of August, one thousand nine hundred and thirty-eight.

FRANK S. SHARP,
Deputy Secretary of State.

Certificate of Change of Address.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

Certificate of Change of Address.

BETHLEHEM SHIPBUILDING CORPORATION, LTD., a stock corporation of the State of Delaware, duly licensed to do business in the State of New York under date of March 6th, 1918, HEREBY CERTIFIES that the place within the State of New York which is to be its principal place of business, has been changed from No. 111 Broadway, in the Borough of Manhattan, City of New York, to No. 25 Broadway, in said Borough; and that the office or place of business of William J. Brown, the person heretofore designated by said Corporation as the person upon whom process against the corporation may be served within the State of New York has also been changed from No. 111 Broadway, in the Borough of Manhattan, City of New York, to No. 25 Broadway, in said Borough.

IN WITNESS WHEREOF, said BETHLEHEM SHIPBUILDING CORPORATION, LTD., has caused this certificate to be signed in its name by its President or one of its Vice Presidents and its corporate seal to be hereunto affixed and attested by its Secretary or one of its Assistant Secretaries this 12th day of June, 1922.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

By H. S. SNYDER,
Vice President.

(L. S.)

Attest:
R. E. MCMATH,
Secretary.

244 *Certificate of Change of Address.*

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

On this 12th day of June, in the year 1922, before me personally came H. S. Snyder to me known, who, being duly sworn, did depose and say that he resided in Bethlehem, Pennsylvania; that he is the Vice President of BETHLEHEM SHIPBUILDING CORPORATION, LTD., the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by
245 order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

H. M. WITEMEYER,
Notary Public.
Commission expires April 1. 1923.

(L. S.)

246

Stipulation As To Record.

(Same Title)

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the notice of appeal, the order appealed from, the opinion of the Court in making the order appealed from and all of the papers which were before the Court in making the order appealed from.

Dated, New York, February , 1939.

ROBERT P. WEIL,
Solicitor for Appellants.

CRAVATH, deGERSDORFF, SWAINE & WOOD,
Solicitors for Appellee, appearing specially.

250 **Clerk's Certificate.**

(Same Title)

I, CHARLES WEISER, Clerk of the District Court of United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the notice of appeal, the order appealed from, the opinion of the Court in making the order appealed from and all of the papers which were before the Court in making the order appealed from, all of which papers are on file in said District Court, as stipulated by the parties.

In testimony whereof, I have caused the seal of the said
251 Court to be hereunto annexed at the Borough of Manhattan, City of New York, in the Southern District of New York, this day of February in the year of our Lord one thousand nine hundred and thirty nine and of the Independence of the United States, one hundred and sixty fourth.

CHARLES WEISER,
Clerk

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[fol. 85] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN, and EMMA BOURKE, Appellants,

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD., Appellee, and United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, John E. Aldred, and The Chase National Bank of the City of New York, Defendants

Before L. Hand and Clark, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York; Francis G. Caffey, Judge

Action by the Neirbo Company and others, stockholders of United Shipyards, Inc., to restrain the Shipyards corporation from carrying out a contract for the sale of shipyards and other property to Bethlehem Shipbuilding Corporation, Ltd., wherein the Shipbuilding corporation was later added as a party defendant. From an order dismissing the Shipbuilding corporation as a defendant, because it was not a resident of the District, plaintiffs appeal.

Affirmed.

Robert P. Weil, of New York City (Laurence A. Tanzer, of New York City, of counsel) for appellants.

William Dwight Whitney, of New York City (Cravath, deGersdorff, Swaine & Wood and Robert D. Blasier, both of New York City, of counsel) for appellee.

CLARK, Circuit Judge:

This appeal assigns error in the action of the District Court in granting the motion of Bethlehem Shipbuilding [fol. 86] Corporation, Ltd., to quash service of process upon it and in dismissing the action as to it on the ground that it was not a resident of the Southern District of New York within the requirements of the federal venue statute, Jud. Code, § 51, 28 U. S. C. A. § 112. Appellants, plaintiffs below, ground their appeal on two claims: first, that appellee, the Bethlehem corporation, is a resident of the District, notwith-

standing its incorporation in the State of Delaware, because of the location of its chief business and executive offices within the District and its designation of an agent to accept process there, in compliance with the conditions under which a foreign corporation is legally permitted to do business within the State of New York, and second, that such designation of an agent to accept process in connection with appellee's qualification to do business in New York is a waiver of the venue defense. In the light of the statutory language and of the well settled rule that lack of venue is a personal privilege which a defendant can waive, a reversal of the order of dismissal would become necessary if either the claim of residence in the district or that of waiver could be sustained. But whatever objections of policy may be urged against it, we feel the law to the contrary is too well established to be now overturned.

The action was originally brought by the appellants, who are citizens and residents of New Jersey, against United Shipyards, Inc., a New York corporation of which they are stockholders, to restrain the carrying out by the latter of a contract for the sale of drydocks in the waters of New York Harbor and other property to Bethlehem Shipbuilding Corporation, Ltd. The court refused to stay the sale, but added certain other persons as parties on the plaintiffs' motion. Then the plaintiffs filed an amended and supplemental bill alleging the consummation of the sale and praying relief in respect thereof. In this bill they asked that the Bethlehem corporation be added, and they described it as "a corporation organized and existing under the laws of the State of [fol. 87] Delaware, and * * * a citizen and resident of the State of Delaware." The court ordered that Bethlehem be added as a defendant. Upon being served with process, Bethlehem appeared specially and moved to quash the service and the Marshal's return thereof. The appeal is taken from the order granting Bethlehem's motion and dismissing the action as to it.

The material provisions of Jud. Code, § 51, 28 U. S. C. A. § 112, applicable to this action are as follows:

"* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different States,

suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Since jurisdiction of the present action is founded on the diversity of citizenship of the parties, the latter part of this statute applies. It is settled, however, that except for the limitation of suit to a single district—that whereof the defendant is an inhabitant—in suits other than those based on diversity of citizenship, the requirements of the two parts of the statute are identical, and precedents as to one part are equally authoritative as to the other. In re Keasbey and Mattison Co., 160 U. S. 221. The defense of lack of venue was open to this defendant, notwithstanding the presence in the action of other defendants properly sued in the district. Camp v. Gress, 250 U. S. 308; McLean v. State of Mississippi, 5 Cir., 96 F. 2d 741, cert. den. 59 S. Ct. 84.

We shall consider successively the two claims of error urged by appellants.

First. Suits by and between corporations as citizens of different states have always presented troublesome problems of jurisdiction to the federal courts. For half a century after the passage of the first judiciary act, a corporation was allowed to sue or be sued in the circuit courts [fol. 88] only when all its members were citizens of the state which created it. Bank of United States v. Deveaux, 5 Cranch 61. But in 1844, it was held in Louisville R. R. Co. v. Letson, 2 How. 497, that for the purposes of determining federal jurisdiction a corporation was to be deemed a person or an inhabitant, and thus a citizen, of the state in which it was incorporated. Although this conclusion has been assailed as unreal, it has been consistently followed ever since, and attempts at legislative change, even when made under distinguished sponsorship, have proven unsuccessful.[1] Hence on all questions of jurisdiction in-

[1] Among proposals to limit the jurisdiction of the federal courts before the Congress in 1932 was one drafted by the then Attorney General Mitchell and sponsored by President Hoover which would not have eliminated any of the language of Jud. Code, § 24 (1), 28 U. S. C. A. § 41 (1), defining the original jurisdiction of the federal courts over suits between citizens of different states, but would have

volving diversity of citizenship, this appellee is conclusively determined to be a citizen of the State of Delaware by reason of its incorporation there.

It was perhaps not logically necessary that a like conclusion should be reached as to the residence of a corporation under the requirements as to venue; but such a conclusion was a natural one, in the light of the language of the Letson case and the policy involved. And it was the meaning ascribed to the residence requirement in Ex parte Schollenberger, 96 U. S. 369, 377, decided in 1877. Yet the question was not then important, for the venue statute, from the time of the original judiciary act, had provided that a defendant might be sued in a district in which he should be "found" at the time of serving the writ. (Act of Sept. 24, 1789, c. 20, § 11, 1 Stat. 79; Act of Mar. 3, 1875, c. 137, 18 Stat. 470.) Hence the court held that a corpora- [fol. 89] tion doing business within the state was to be found within it for the purposes of venue. Ex parte Schollenberger, supra. This part of the statute was, however, eliminated in 1887. (Act of Mar. 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by the Act of Aug. 13, 1888, c. 866, § 1, 25 Stat. 433.) From that time the statute has required residence in (or being an inhabitant of) the district to support the action. Jud. Code, § 51, supra. After the change in the statute it has been held uniformly by the Supreme Court and generally by the lower federal courts that residence is limited to the state of incorporation of the corporation and is not satisfied by the doing of business within the state. Shaw v. Quincy Mining Co., 145 U. S. 444; Southern Pacific Co. v. Denton, 146 U. S. 202; In re Keasbey and Mattison Co., 160 U. S. 221; Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501;

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added to it a provision that a foreign corporation carrying on business in a state other than the one wherein it was organized should be treated as a citizen of the former state for suits by residents thereof arising out of the business carried on in such state. S. B. 937, 72d Cong., 1st Sess. (1932). It failed of passage. See Comment by members of the faculty of the University of Chicago Law School, Limiting Jurisdiction of Federal Courts, 31 Mich. L. Rev. 59 (1932), and Clark, Diversity of Citizenship Jurisdiction of the Federal Courts, 19 A. B. A. J. 499 (1933), for discussion of the proposal and for other relevant citations.

Seaboard Rice Milling Co. v. Chicago, R. I. & P. Ry. Co., 270 U. S. 363; Yanuszauckas v. Mallory S. S. Co., 2 Cir., 232 F. 132; McLean v. State of Mississippi, 96 F. 2d 741, cert. den. — U. S. — , 59 S. Ct. 84, 83 L. Ed. 20; Central West Public Service Co. v. Craig, 8 Cir., 70 F. 2d 427; De Dood v. Pullman Co., 2 Cir., 57 F. 2d 171, aff'g 53 F. 2d 95, E. D. N. Y.

Among the several decisions of district courts to the same effect may be cited that of A. N. Hand, D. J., in Beech-Nut Packing Co. v. P. Lorillard Co., 287 F. 271, S. D. N. Y., in 1921, relied on by the court below in the present case. The only exception in recent years to this uniform current of decision seems to be Dodge Mfg. Co. v. Patten, 7 Cir., 60 F. 2d 676, aff'g 23 F. 2d 852, D. C. Ind., which was based upon the decision of Mr. Justice Harlan on circuit in U. S. v. Southern Pacific R. R. Co., 49 F. 297, N. D. Cal. The court, however, failed to note the later contrary decisions of the Supreme Court, in several of which Mr. Justice Harlan dissented. Cf. Shaw v. Quincy Mining Co. and Macon Grocery Co. v. Atlantic Coast Line R. R. Co., supra.[2]

[fol. 90] Appellants, however, criticize the policy followed in these cases as applied to the modern private corporation doing business in many different places and suggest ingenious distinctions to lessen their force as precedents. But so far as the policy is concerned, Congress has shown itself as yet distinctly uninterested in a change in the direction urged by appellants. Indeed, so long as the citizenship of a corporation for jurisdictional purposes is determined by the state of its incorporation, there would seem no good reason for a different view of the venue requirements. The limitation on suits against a corporation implicit in the rule as to jurisdiction would be of comparatively little effect if all plaintiffs who lived outside the state of incorporation could sue the corporation at will wherever it carried on business.

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[2] The Patten case has recently been questioned in its own circuit for this reason. Hamilton Watch Co. v. The George W. Borg Co., N. D. Ill. E. D., Mar. 6, 1939, Wilkerson, D. J. (Dept. of Justice, Decisions on Federal Rules of Civil Procedure, Bull. No. 23, Apr. 3, 1939.)

The suggested grounds for distinguishing the cases find no support in the precedents themselves or in the reasons behind them. Thus it is asserted that in no one of the decisions of the Supreme Court was there involved a corporation which not only does business and has its headquarters within the state, but also maintains there a designated office and agent to accept process. The cases discussed below in connection with appellants' second claim show that this combination of circumstances is not enough to show even waiver of the venue defense, and therefore certainly not residence in the district. Moreover, the reasons for, and historical development of, the rule show that the claimed distinction would be simply a direct repudiation of the rule itself. See especially Shaw v. Quincy Mining Co. and In re Keasbey and Mattison Co., supra. The latter case demonstrates, too, that no sound distinction is possible based on the fact that some of the cases, such as those for patent or copyright infringement, can be brought only in the federal courts, while actions such as the present one can be brought in either the state or the federal courts. Indeed, the stricter rule might be justified, if at all, in cases such as the present where a more extensive [fol. 91] choice of forum is possible. But no such distinction appears in the statute or is suggested by the cases.

Some support is claimed from decisions of the New York courts that a foreign corporation having qualified to do business within the state is present within the state, so as not to prevent the running of the statute of limitations in its favor. Cf. Comey v. United Surety Co., 217 N. Y. 268, 273-274. Such a result is reasonable, since the corporation is continuously subject to suit in the state court. It is not useful in determining the entirely different problems of federal jurisdiction. Erie Railroad v. Tompkins, 304 U. S. 64, does not make such cases binding authorities on the present issue; whatever else that case may do, it certainly does not throw the determination of federal jurisdiction into the state courts.

Second. Appellants' other claim is based upon the facts, admitted on the record, that appellee qualified to do business within the State of New York in 1918 and, as required by the law then in force, designated an agent to accept

process.[3] Such agent, who is located in the Southern District of New York, is still acting under such designation. But the question whether such designation constitutes a waiver of the venue defense seems also well settled, contrary to the appellants' contention. In the case of Southern Pacific Co. v. Denton, 146 U. S. 202, decided in 1892, there is a clear statement of the court that the supposed agreement of the corporation went no further than a stipulation that process might be served upon its officers or agents, and that, while this might subject the corporation after proper service to the jurisdiction of a federal court so long as the federal statutes allowed it to be sued in [fol. 92] the district in which it was *found*, such an agreement could not, since Congress had made citizenship of the state, with residence in the district, the sole test of jurisdiction in this class of cases, "estop the corporation to set up non-compliance with that test" when sued in a federal court.

The appellants attempt to distinguish this case on several grounds going to show that this statement was dictum only, unnecessary to the decision. It was, however, a direct statement on the point in question and has been accepted as authoritative. It is true that in the Denton case the Texas statue authorizing qualification of a foreign corporation to do business in the state was held unconstitutional, since it required as a condition of such qualification that the corporation relinquish its right of removal of cases to the federal courts. But the holding that there was no waiver was made an alternative ground of decision. It is also claimed that the act had already been repealed, and that the Texas records do not disclose any actual designation of the defendant corporation. But the facts stated by the court show that the repeal came after the action was brought, and the decision was rendered on the basis, admitted on the record, that the corporation had complied with the statute. Cases following and applying the Denton case include McClean v.

[3] N. Y. Gen. Corp. Law, §§ 15, 16, Cons. Laws of 1909, c. 22. These statutes were later changed to provide for the designation of the secretary of state as the agent of the corporation upon whom process might be served, but all prior designations of particular agents were continued. N. Y. Gen. Corp. Law, §§ 210, 213.

State of Mississippi, 5 Cir., 96 F. 2d 741, cert. den—U. S.—59 S. Ct. 84, 83 L. Ed. 20; Heine Chimney Co. v. Rust Engineering Co., 7 Cir., 12 F. 2d 596; and numerous district court decisions. (Beech-Nut Packing Co. v. P. Lorillard Co., supra; Gray v. Reliance Life Ins. Co., 24 F. Supp. 144, W. D. La.; Standard Stoker Co. v. Lower, 46 F. 2d 678, Md.; Thomas Kerfoot & Co. v. United Drug Co., 38 F. 2d. 671, Del.; Jones v. Consolidated Wagon & Machine Co., 31 F. 2d 383, S. D. Idaho, appeal dismissed 280 U. S. 519; Hagstoz v. Mutual Life Ins. Co. of New York, 179 F. 569, E. D. Pa.; Platt v. Massachusetts Real-Estate Co., 103 F. 705, Mass.)

The decision by the Fifth Circuit Court of Appeals in McLean v. State of Mississippi, supra, contains a careful analy- [fol. 93] sis of the authorities and considers and disposes of the various objections offered against the ruling in the Denton case. Application for writ of certiorari in the McLean case was denied by the Supreme Court on October 10, 1938, after the decision below in the pending action. 59 S. Ct. 84.

Decisions and opinions to the contrary seem to be limited to the ruling of the district court, found in 23 F. 2d 852 in the case of Patten v. Dodge Mfg. Corp., supra—since the circuit court of appeals affirmed solely on the point of residence to which its opinion is cited above (60 F. 2d 676)—and some early rulings of lower courts. Schainwald v. Davids, 69 F. 704, N. D. Cal.; and Consolidated Store Service Co. v. Lamson Consolidated Store-Service Co., 41 F. 833, Mass., the force of which is weakened by the decision of the same judge contra in Platt v. Massachusetts Real-Estate Co., supra.[4]

It is asserted, however, that the Denton case and the cases relying on it are not controlling here because they involved only a consent by the corporation through its designated agent to accept process, while the present consent is one to be sued within the state. And reliance is placed upon a recent case, decided by the Circuit Court of Appeals for the Tenth Circuit, Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 100 F. 2d 770.[5]

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[4] Cf. also statements in Bogue v. Chicago, B. & Q. R. Co., 193 F. 728, S. D. Iowa; U. S. v. Sheridan, 119 F. 236, W. D. Ky.; and O'Donnell v. Slade, 5 F. Supp. 265, M. D. Pa.

[5] Petition for certiorari filed March 15, 1939. Supreme Court Appellate Docket No. 750. 6 U. S. L. Week 979, 1011.

In this case the court, while recognizing the general rule referred to above, did hold that an Oklahoma statute required a consent not merely to accept process, but to be sued in the state courts (as indeed the trial court found, 100 F. 2d at pp. 773-774), and that this consent likewise operated in the federal courts to constitute a waiver of the venue de- [fol. 94] fense. Notwithstanding the authority of this court, we are not convinced of the soundness of this distinction. If state statutes of the form considered in the cases discussed above do not force a waiver of the federal venue privilege, it is difficult to see what is added by this further provision. It would mean, of course, that the addition of a few words to a state statute would demolish a privilege given by federal law. Moreover, as a practical matter, state legislation requiring consent to be sued as a condition of qualification is usually an unnecessary gesture, since state courts will have jurisdiction of such suits against foreign corporations as concern the state or its citizens, if service of process can be had on the corporation. The statute therefore need only provide for service of process. Indeed, the added provisions of the Oklahoma statute have another reasonable explanation, i. e., the necessity that suits against corporations should satisfy local requirements of venue, since the designated agent was to be found only at the State Capitol. Hence there was coupled with the requirement of the designation of an agent upon whom service of process might be made, the further statement that action might be brought in any county. Okl. Stat. (1931) § 130; cf. Okl. Const., Art. 9, § 43.

Whatever may be the force of the distinction, however, the court did recognize the general rule that a mere designation of an agent to accept process is not a waiver of the venue privilege. Appellants' attempted construction of the New York corporation laws as including a consent to be sued comparable to that found in the Oklahoma statute cannot be sustained. The applicable statutes in New York are clear in requiring merely the designation of an agent "upon whom all process in any action or proceedings against it may be served within this state."[6]

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[6] This is the wording of the present statute, N. Y. Gen. Corp. Law, § 210, under which the secretary of state is the agent to be designated; the language of the earlier statute was similar. See note 3, supra.

[fol. 95] It is true that another statute authorizes actions against foreign corporations under certain circumstances, including that "where a foreign corporation is doing business within the state." N. Y. Gen. Corp. Law, § 225. But this is but a general grant of jurisdiction applying to all actions within the defined classes, whether the corporation has properly qualified to do business or not and whether it is acting legally or illegally. Since, therefore, this general grant of jurisdiction operates independently of any designation of an agent to accept process, it cannot be construed to extend the consent which the corporation has made by affirmatively complying with the requirements of law as to doing business within the state.

Appellants also claim that the New York statute has been construed as one requiring the corporation's consent to be sued in the local courts, citing Smolik v. Phila. & Reading C. & I. Co., 222 F. 148, S. D. N. Y.; and Bagdon v. Phila. & Reading R. & I. Co., 217 N. Y. 432. These cases are relied on as showing the corporation's consent, by its designation of an agent to accept process, to being sued on all transitory actions, whereas without such designation, suit would lie only in the jurisdiction where it had done the business out of which the cause of action arose. But this concerns the jurisdiction of the court over the case, not the personal privilege as to the place of the suit accorded the defendant by Jud. Code, § 51. Jurisdiction over the causes was obtained, since personal service could be had on the defendants through their agents designated to accept process. Beech-Nut Packing Co. v. P. Lorillard Co., supra. So here, had plaintiffs been residents of the Southern District of New York, so that the venue was properly laid, service of process upon the defendant would have been had by service upon its agent. The cases do not go beyond this or affect the requirement of venue.

We conclude, therefore, that under existing law appellee was entitled to claim its privilege not to be sued in the [fol. 96] Southern District of New York. When it did so,[7]

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[7] The cumbersome method of claiming the privilege resorted to here—special appearance and motion to set aside service of the subpoena and the Marshal's return of service of the subpoena—may now be superseded by a simple motion to dismiss, under Rule 12(b), Federal Rules of Civil Procedure.

there was no other course of action open to the court below but to dismiss the action as to it. There seems little hardship involved to the plaintiffs, for appellee can be sued in the appropriate federal districts, while the entire action as now conceived by the plaintiffs can be brought in the state courts. And if a change in policy is desirable, it must be sought from Congress. It follows that the order of dismissal as to appellee must be affirmed.

Affirmed.

[fol. 96½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Neirbo Company et al., Appellants, v. Bethlehem Shipbuilding Corporation, Ltd., Appellee, and United Shipyards, Inc., et al., Defendants. (Copy.) Opinion. Clark, Circuit Judge.

[fol. 97] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of April, one thousand nine hundred and thirty-nine.

Present: Hon. Learned Hand, Hon. Charles E. Clark, Circuit Judges.

NEIRBO COMPANY et al., Plaintiffs-Appellants,

vs.

BETHLEHEM SHIPBUILDING CORPORATION, LTD., Defendant-Appellee; UNITED SHIPYARDS, INC., et al., Defendants.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 98] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Neirbo Company et al., vs. Bethlehem Shipbuilding Corporation, Ltd. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 19, 1939. William Parkin, Clerk.

[fol. 99] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 98, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Neirbo Company, et al., Plaintiffs-Appellants, against Bethlehem Shipbuilding Corporation, Ltd., Defendant-Appellee, United Shipyards, Inc., et al., Defendants, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twentieth day of April, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-third.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 750, Oklahoma Packing Company, et al. vs. Oklahoma Gas and Electric Company, et al.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.